United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

575

565

APPENDIX

UNITED STATES COURT OF APPEALS
For The District Of Columbia

No. 22,139

ALBERT F. JORDAN, individually, and as
Superintendent of Insurance of the
District of Columbia,

Appellant,

v.

ACACIA MUTUAL LIFE INSURANCE COMPANY,
a corporation chartered by the
Congress of the United States in 1869,
and
KARL W. CORBY,

Appellees.

Appeal From The United States District Court
For The District Of Columbia

CHARLES T. DUNCAN,
Corporation Counsel, D. C.

HUBERT B. PAIR,
Principal Assistant Corporation
Counsel, D. C.

RICHARD W. BARTON,
Assistant Corporation
Counsel, D. C.

DAVID P. SUTTON,
Assistant Corporation
Counsel, D. C.

Attorneys for Appellant,
District Building,
Washington, D. C. 20004

I N D E X

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 266-68

ACACIA MUTUAL LIFE INSURANCE COMPANY,
a corporation chartered by the
Congress of the United States in 1869
KARL W. CORBY

vs.

ALBERT F. JORDAN, individually, and as
Superintendent of Insurance of the
District of Columbia

CIVIL DOCKET

DATE 1968		
Jan.	31	Complaint, appearance filed
Jan.	31	Summons, copies (1) and copies (1) of Complaint issued ser 2-1-68
Feb	21	Answer of defendant to complaint; c/m 2/21/68; appr of Charles T. Duncan, John A. Earnest, Lyman J. Umstead and Vincent E. Ferretti, Jr. filed.
Feb	21	Calendared. (N) AC/N
Mar.	18	Motion of plaintiffs for summary judgment; affidavit; P&A's; Exhibit A Statement; c/m 3-18-68; M. C. filed
Mar.	28	Stipulation of counsel extending time for deft to oppose motion for summary judgment to and including 4-4-68. filed.
Apr.	17	Motion of deft. for summary judgment; statement; P&A; affidavit and exhibit 1, through 5; c/m 4/17/68. M. C. filed

Apr.	23	Opposition of pltffs. to motion for summary judgment; affidavit; exhibits (6) P&A; c/m 4/22/68. filed
May	10	Order granting plaintiff's motion for summary judgment and denying defendants motion for summary judgment. Holtzoff, J.
May	10	Corrected Copy of Opinion of May 1, 1968. Holtzoff, J.
June	10	Notice of appeal by deft. form judgment 5/10/68 copies to J. Wilson. (Dist of Col. no fee) filed
June	25	Transcript of proceedings 5/1/68 Vol one; pages 9, Gerald Nevitt, reporter. (Courts copy) filed
July	19	Record on Appeal delivered to USCA; D.C. Govt. no charge (Clerk's fee 80 cents w/c) filed
July	19	Receipt from USCA for original record. filed

* * * * *

[Filed January 31, 1968]

COMPLAINT

(For Declaratory Judgment and Injunctive Relief)

1. This is an action for declaratory judgment and other relief to obtain a declaration of the rights of the parties under an actual existing controversy justiciable in character.

2. The Court has jurisdiction under and by virtue of the provisions of Section 11-521 of the District of Columbia Code (1967 ed.); the Declaratory Judgment Act, 28 U. S. C. Sections 2201 and 2202; and Rule 57, Federal Rules of Civil Procedure. The present controversy has arisen in relation to the District of Columbia Act pertaining

to Domestic Life Insurance Companies, Section 35-501, et seq. of the District of Columbia Code.

3. Plaintiff, Acacia Mutual Life Insurance Company, (hereinafter "Acacia"), is an insurance company chartered by the Congress of the United States in 1869. Its principal office is in the city of Washington, D. C., 51 Louisiana Avenue, N.W., 20001 and it is authorized to and does conduct business in the District of Columbia.

4. Plaintiff, Karl W. Corby, is engaged in the construction business in the metropolitan area and he also is a Director of Acacia Mutual Life Insurance Company, having been elected to that office for a term of three years at the annual meeting of the policyholders held on March 21, 1967. His term will expire in March 1970, at which time he will be eligible for reelection.

5. Defendant, Albert F. Jordan, is the Superintendent of Insurance of the District of Columbia with offices at 1145 19th Street, N. W., Washington, D. C. 20006. He is sued in both his individual and official capacities.

6. On April 12, 1962, Acacia made a twenty-one year mortgage loan of $288,000 to Karl W. Corby and others, repayment to be made in monthly installments of $2,000, including interest at six percent. The loan is fully secured by a six-story office building located at 1913 Eye Street, N. W.

7. At the time the said loan was made, its terms in all respects were in accordance with the terms generally prevailing in this area in connection with other loans of the same type; plaintiff, Karl W. Corby, was neither an officer nor a director of Acacia; and the making of the loan did not involve any special or preferential treatment.

8. Since the loan was made the payments have been made in accordance with the terms and conditions of the note and deed of trust; the repayments are current; and, neither before nor after plaintiff Corby's election to Acacia's Board of Directors has the loan received special or preferential treatment.

9. The present mortgage money market for loans of this type is in the vicinity of seven per cent, instead of the rate of six per cent which the existing loan carries, and, if Acacia were to dispose of the said loan it would have to sell it at a discount, to the disadvantage of its policyholders and beneficiaries.

10. Section 35-530 of the District of Columbia Code provides:

> "No director or officer of any company doing business in the District shall receive any money or valuable thing for negotiating, procuring, recommending, or aiding in any purchase by or sale to such company of any property, or any loan from such company, nor be pecuniarily interested, either as principal, coprincipal, agent, or beneficiary, in any such purchase, sale, or loan, nor shall the financial

> obligation of any such director or officer be guaranteed by such company in any capacity; Provided, That nothing herein contained shall prevent any such director or officer from receiving a fee for appraising property for said company or for serving on any committee that passes on the investments of said company: Provided further, That nothing herein contained shall prevent a life insurance company from making a loan upon a policy held therein by a director not in excess of the net value thereof. Any person violating any provision of this section shall be guilty of a misdemeanor."

11. In 1953, defendant Jordan ruled that Section 530 made it unlawful for officers of Acacia to have mortgage loans with it even though the loans had been made prior to the time such persons became officers. This ruling was given in response to an inquiry made by Acacia in a letter dated December 9, 1958, copy of which is attached hereto and marked Exhibit "A". A copy of the letter of defendant in reply is attached hereto and marked Exhibit "B". It states defendant Jordan's position as follows:

> "Section 35-530, D. C. Code, 1951 edition, provides that, 'No director or officer of any company doing business in the District shall * * * be pecuniarily interested, either as principal, coprincipal, agent, or beneficiary, in any * * * loan'.
>
> "It will be seen that the law makes no distinction as to the relative importance of the officer nor as to the particular duties to be performed by him. Neither does the law make

> any distinction so as to permit the retention of loans made prior to the appointment to the position held by the officer. The law simply prohibits the status here involved by saying, in effect, that no person who is an officer of a company may, at the same time, have a pecuniary interest in any loan made by the company. Furthermore, it is obvious that the law does not permit the Superintendent of Insurance in his discretion to waive the law where conditions are deemed to be meritorious."

12. Acacia did not contest the ruling of December 16, 1953 because the loans were quite small and could be and were sold to other financial institutions without discount or loss to Acacia.

13. By letter dated June 26, 1967, a copy of which is attached hereto and marked Exhibit "C", Mr. Howard W. Kacy, President of Acacia, advised defendant Jordan of the facts concerning Mr. Corby's interest in the mortgage loan described in paragraph 6 hereof and asked Mr. Jordan to reconsider his 1953 ruling and rule that Acacia had the right to retain the Corby loan in its portfolio.

14. By letter dated June 30, 1967, a copy of which is attached hereto and marked Exhibit "D", defendant advised Mr. Kacy that Section 35-530 of the D. C. Code does not permit an Acacia director to have a pecuniary interest in an Acacia loan regardless of whether it was made before or after such director's election to the board of directors.

15. This appears in the first paragraph of said letter marked Exhibit "D", where defendant informed plaintiff as follows:

> "I am sorry that I am unable to concur in the opinion expressed in your letter of June 26 that a domestic company may hold a mortgage on the property of one of its directors, provided the loan was made prior to his becoming a director. In my opinion the law does not permit a director to have such a pecuniary interest at any time. It seems to me that section 35-530 clearly says, on the point here involved:
>
> " 'No director or officer of any company doing business in the District shall receive any money ~~or valuable thing~~ for negotiating, ~~procuring, recommending, or aiding in any purchase by or sale to such company of any property,~~ or any loan from such company, nor be pecuniarily interested, either as principal, coprincipal, agent, or beneficiary, in any such ~~purchase, sale,~~ or loan, nor ~~shall the financial obligation of any such director or officer be guaranteed by such company in any capacity~~ * * * .' "

16. Pursuant to the suggestion contained in the last paragraph of said letter marked Exhibit "D", Acacia advised defendant by letter dated August 10, 1967, a copy of which is attached hereto and marked Exhibit "E", that it desired a meeting to discuss the question.

17. By letter dated August 18, 1967, defendant advised Acacia that he would arrange a mutually agreeable date for conference. Said letter is attached hereto and marked Exhibit "F".

18. Thereafter, on October 10, 1967, defendant and an Assistant Corporation Counsel met with representatives of Acacia. During the conference Acacia fully explained its position and presented defendant with a written memorandum discussing the facts and the legal issue.

19. During the conference, defendant reaffirmed his earlier rulings and stated that a person who has a loan with Acacia or an interest in a loan is not eligible to be a director of the company and that Acacia could not continue a person as a director who is not eligible to serve. He also stated that he would not issue Acacia a Certificate of Authority if the matter has not been resolved prior to April 1968. The Assistant Corporation Counsel present concurred in defendant's position and both defendant and his attorney suggested that Acacia should seek a judgment declaring the plaintiff's rights under said Section 530.

20. Defendant's ruling subjects plaintiff, Karl W. Corby, to criminal prosecution under Section 35-530 which prescribes imprisonment or fine, or both for persons convicted of violating its provisions.

21. Under Section 35-404 of the District of Columbia Code it is unlawful for Acacia to transact any insurance business in the District of Columbia unless it has a Certificate of Authority issued by defendant. Said section also provides that such certificates must be renewed annually at the end of April and defendant, in certain circumstances, is empowered to refuse to renew a Certificate of Authority.

22. Acacia is under no duty, legal or otherwise, to dispose of the loan described in paragraph 6 hereof even though Karl W. Corby continues to serve as a director of Acacia and defendant's contrary conclusion is illegal and improper as a matter of law.

23. Acacia is under no duty, legal or otherwise, to cause or attempt to cause the removal of plaintiff Corby from its Board of Directors and defendant's contrary conclusion is illegal and improper as a matter of law.

24. Acacia does not have authority to remove or to cause the removal of plaintiff Corby from its Board of Directors.

25. Section 530 does not make it illegal for plaintiff Corby, who is one of several coprincipals on an outstanding Acacia loan, to continue to serve on Acacia's Board of Directors and defendant's conclusion to the contrary is illegal and improper as a matter of law.

26. The effect of the defendant's erroneous ruling and his threatened action to not renew Acacia's Certificate of Authority will be to take plaintiffs' liberty and property without due process of law and cause plaintiffs to suffer irreparable injury and damage for which there is no adequate remedy at law.

27. Plaintiffs have exhausted their administrative remedies.

28. By reason of the foregoing there exists between plaintiffs and defendant an actual controversy within the meaning of the Declaratory Judgment Act (28 U. S. C. Sec. 2201) and plaintiffs are entitled to have their rights declared by this Court as provided for in that Act.

29. An immediate determination of plaintiffs' rights under the circumstances alleged above is necessary in order to prevent incalculable and incurable harm to the plaintiffs created by the illegal action of the defendant; and this Court, pursuant to Rule 57, Federal Rules of Civil Procedure, may order a speedy hearing of this action, and, for that purpose may advance it on the calendar.

WHEREFORE, plaintiffs pray that this Court adjudge, declare and decree that:

1. Plaintiff, Karl W. Corby, is not in violation of Section 35-530 of the District of Columbia Code by continuing to serve in his elected capacity as a director while at the same time he is one of several co-principals on a loan which was obtained prior to his becoming a director.

2. Plaintiff, Acacia Mutual Life Insurance Company, has no right, authority, cause or duty to remove or cause the removal of plaintiff Corby from its Board of Directors.

3. Plaintiff, Acacia Mutual Life Insurance Company, is under no duty to dispose of the loan on which Karl W. Corby is one of several

coprincipals and no adverse legal consequences can flow from its failure to dispose of said loan.

4. Defendant has no authority to refuse to renew Acacia's Certificate of Authority on the ground that the said Karl W. Corby continues to serve as director of Acacia while at the same time he has an interest in a loan which was made prior to the time he became a director.

5. Defendant be permanently enjoined from refusing to renew Acacia's Certificate of Authority on the ground set out in the immediately preceding paragraph.

6. Defendant be permanently enjoined from instituting or initiating a criminal prosecution of plaintiff, Karl W. Corby, under Section 35-530.

7. Defendant be enjoined, pending hearing on the merits, from enforcing or attempting to enforce, in any manner whatsoever, the ruling contained in the letter of June 30, 1967 from defendant to Mr. Kacy.

8. And for such further and other relief as the Court may deem equitable and just under the circumstances.

* * * * *

[Exhibit 1 (A)]

December 9, 1953

Hon. Albert F. Jordan
Superintendent of Insurance
District of Columbia
300 Indiana Avenue, N. W.
Washington, D. C.

Dear Mr. Jordan:

The end of the year is fast approaching and we are already at work on the preparation of our Annual Statement. This gives rise to a question on which we would like to have your opinion.

On April 20, 1949 Acacia made a mortgage loan in the sum of $13,750 to Mr. C. T. Hudgins, the present outstanding balance of which is $11,800. On April 29, 1949 we made a mortgage loan of $11,500 to Mr. H. S. Browne, the principal of which has been reduced to $10,100. On March 12, 1952 we made a mortgage loan in the amount of $13,000 to Mr. C. M. Gaines, the outstanding balance of which at this time is $6,700. All these men were employees of the Company at the time the loans were made on their homes.

Subsequently, on April 22, 1953, these three men were promoted to be appointed officers of Acacia -- Mr. Hudgins as Attorney, Mr. Browne as Assistant Comptroller and Mr. Gaines as Chief Tax

Accountant. None of these appointed officers operate on a policy making level, nor are they members of our Investment or Finance Committees, which pass upon applications for mortgage loans.

Under the circumstances, we feel that the investment laws of the District relating to the prohibition of loans to officers are not applicable in these three cases, since the loans were made prior to their promotion to appointed officers of the Company. However, we would like to have the benefit of your observations in the matter.

Sincerely yours,

/s/ Howard W. Kacy
Howard W. Kacy
Executive Vice President

* * * * *

[Exhibit 2 (B)]

December 16, 1953

Mr. Howard W. Kacy,
Executive Vice President,
Acacia Mutual Life Insurance Company,
Washington 1, D. C.

Dear Mr. Kacy:

This is in reply to your letter of December 9, in which you request my opinion concerning the status of certain persons who have be-

come officers of your company while there are outstanding certain mortgage loans previously made to them. You point out that these officers will not operate on a policy making level, and that they are not members of your committees having to do with investments and finance which pass upon applications for mortgage loans.

Section 35-530, D. C. Code, 1951 edition, provides that, "No director or officer of any company doing business in the District shall * * * be pecuniarily interested, either as principal, coprincipal, agent, or beneficiary, in any * * * loan".

It will be seen that the law makes no distinction as to the relative importance of the officer nor as to the particular duties to be performed by him. Neither does the law make any distinction so as to permit the retention of loans made prior to the appointment to the position held by the officer. The law simply prohibits the status here involved by saying, in effect, that no person who is an officer of a company may, at the same time, have a pecuniary interest in any loan made by the company. Furthermore, it is obvious that the law does not permit the Superintendent of Insurance in his discretion to waive the law where conditions are deemed to be meritorious.

Under the circumstances, therefore, it is my opinion that these persons may not lawfully have mortgage loans with the company.

Sincerely yours,

Albert F. Jordan
Superintendent of Insurance

* * * * *

[Exhibit 3 (C)]

June 26, 1967

Mr. Albert F. Jordan
Superintendent of Insurance
1145 - 19th Street, N. W.
Washington, D. C. 20036

Dear Mr. Jordan:

I would like to discuss with you a mortgage loan of $288,000 we made on April 12, 1962 to Karl W. Corby Construction Corporation, Karl W. Corby and Company, Inc., and to Karl W. Corby, Edward M. Castle, and William B. Asher, as individuals. The loan is secured by a six story office building located at 1913 Eye Street, N. W. The duration of the loan is 21 years, with monthly payments of $2,000, including interest at 6%. Payments on the loan have been made in a satisfactory manner and, at the present time, the balance of the loan is $247,414.31.

At the time the loan was made, Mr. Karl W. Corby had no connection with the Company. However, at our annual meeting on March 21, 1967, he was elected by our policyholders to the Board of Directors. At that time, I asked our General Counsel for his opinion as to whether this loan could be retained by the Company. He has now given me his opinion that, under the law of the District of Columbia, this loan was not prohibited when made and therefore may be retained.

In view of the legal opinion I have received, I would not normally have written you with respect to this matter. However, I recall the letter you wrote me dated December 16, 1953, in reply to my letter of December 9, 1953. In your letter, you took the position that three loans made to Acacia employees, who later became officers of the Company, could not be retained because of Section 35-530 of the District of Columbia Code. Because these three loans were quite small, we did not question your opinion at that time. However, in view of the fact that the Corby loan is a prime investment for the Company, we would appreciate very much your reconsidering the position taken in your 1953 letter.

In the second paragraph of your letter of December 16, 1953, you stated that Section 35-530 of the D. C. Code provides that:

> "No director or officer of any company doing business in the District shall * * * be pecuniarily interested, either as principal, coprincipal, agent, or beneficiary, in any * * * loan."

From this language you concluded that the law prohibited the status involved in the cases under consideration and provides, in effect, that no person who is an officer of a company may, at the same time, have a pecuniary interest in any loan made by the company.

If the language quoted in your letter were the full text of Section 35-530, we would have to agree that your conclusion was correct. However, I feel that the language omitted is important and gives the statute an entirely different meaning. Let me quote the exact language of this Section, down to the first proviso:

> "No director or officer of any company doing business in the District shall receive any money or valuable thing for negotiating, procuring, recommending, or aiding in any purchase by or sale to such company of any property, or any loan from such company, nor be pecuniarily interested, either as principal, coprincipal, agent, or beneficiary, in any such purchase, sale, or loan, nor shall the financial obligation of any such director or officer be guaranteed by such company in any capacity * * * ".

You will note that I have underscored several words. These words, in my opinion, make it clear that this statute prohibits a person who is a director from receiving a loan from the company for which he is a director and from being pecuniarily interested in any loan made while he is a director of such company. Not only do I feel that this is a correct interpretation of this Section of the Code but I feel such inter-

pretation carries out the intent of the statute. As I understand it, the purpose of this statute was to prevent a company from engaging in dealings with its directors and officers in situations where, because of the relationship of such persons to the company, they could be given preferential treatment.

At the time this loan was made to Mr. Corby, he had no connection with the Company. Therefore, the Company was not prohibited from making the loan to him. This being true, we see nothing in this statute which would cause such loan to thereafter become subject to the prohibition because of a change in the status of the person to whom the loan was made. After you have had an opportunity to review this letter and again study Section 35-530 of the D. C. Code, I am confident that you will agree with our interpretation of this Section and that you will have no question concerning our right to retain the Corby loan in our portfolio.

Sincerely,

/s/ Howard W. Kacy
President

* * * * *

[Exhibit 4 (D)]

June 30, 1967

Mr. Howard W. Kacy,
President,
Acacia Mutual Life Insurance Company,
51 Louisiana Avenue, N. W.
Washington, D. C. 20001

Dear Mr. Kacy:

I am sorry that I am unable to concur in the opinion expressed in your letter of June 26 that a domestic company may hold a mortgage on the property of one of its directors, provided the loan was made prior to his becoming a director. In my opinion the law does not permit a director to have such a pecuniary interest at any time. It seems to me that section 35-530 clearly says, on the point here involved:

> "No director or officer of any company doing business in the District shall receive any money ~~or valuable thing~~ for negotiating, ~~procuring, recommending, or aiding in any purchase by or sale to such company of any property, or~~ any loan from such company, nor be pecuniarily interested, either as principal, coprincipal, agent, or beneficiary, in any such ~~purchase, sale, or~~ loan, ~~nor shall the financial obligation of any such director or officer be guaranteed by such company in any capacity~~ * * * ."

It is my view that the statute was intended to guard against conflicts of interest so that the company's financial decisions would invari-

ably be made at arm's length. Under your interpretation, if the president or chairman of the board of a company became delinquent in his payments on a mortgage made prior to his assumption of that position, would any subordinate officer or employee be so bold as to commence foreclosure proceedings against him? It seems to me that a life insurance company serves its policyholders in a fiduciary capacity, and I simply do not believe that a debtor-creditor relationship should exist between the fiduciary company and those who control it.

Of course, no one expects that an awkward situation would arise in the particular case to which you refer, but I think that the law clearly contemplates that a life insurance company will be careful to avoid a relationship which is inherently improper. In this connection, I have always been impressed by the opinion of Judge Cardozo in Meinhard v. Salmon (before his elevation to the Supreme Court) in which he said:

> "A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this Court."

After you have thought this over, perhaps you would like to discuss it; if so, I will undertake to be available at your convenience.

Sincerely yours,

Albert F. Jordan
Superintendent of Insurance

* * * * *

[Exhibit 5 (E)]

August 10, 1967

Hon. Albert F. Jordan
Superintendent of Insurance
Government of the District of Columbia
1145 19th Street, N. W.
Washington, D. C. 20006

Dear Mr. Jordan:

Thank you for your letter of June 30, in reply to my letter of June 26. In your letter you state that you cannot concur with our opinion that a domestic company may hold a mortgage on the property of one of its directors, provided the loan was made prior to his becoming a director. You state that in your opinion, the law does not permit a director to have such pecuniary interest at any time. You also state that in your opinion the statute was intended to guard against conflicts of interest and that you do not feel that a debtor-creditor re-

lationship should exist between the fiduciary company and those who control it.

While there very well may be some basis for your questioning the desirability of Acacia continuing to retain in its portfolio a loan of a director which was made to him before he became a director, I believe that the important thing at this point is to dispose of the legal question. This question appears to relate solely to the interpretation of Section 35-530 of the D. C. Code. I believe that it would be very desirable for us to dispose of this question at this time so that there will be no further questions with respect to this type of situation in the future. Therefore, I would like to take advantage of your kind offer to discuss this situation with you.

In view of the fact that our difference of opinion involves the interpretation of a statute, it would appear desirable for you to arrange to have either the Corporation Counsel or someone from the Corporation Counsel's Office present for our discussion. I would also like to have someone from my legal staff present when this matter is considered.

If you will let me know a date and time when it will be satisfactory to you, we will be happy to be present at your office in order to discuss this question.

Sincerely,

/s/ Howard W. Kacy
President

* * * * *

[Filed February 21, 1968]

ANSWER OF DEFENDANT, ALBERT F. JORDAN, TO THE COMPLAINT

First Defense

The complaint fails to state a claim against the defendant, Albert F. Jordan, upon which relief can be granted.

Second Defense

1, 2 and 3. Defendant admits the allegations contained in paragraphs numbered 1, 2 and 3 of the complaint.

4. Defendant admits that plaintiff Corby is a Director of Acacia Mutual Life Insurance Company, that he was elected to office for a term of three years on March 21, 1967 and that his term will expire in March, 1970. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph numbered 4 of the complaint.

5. Defendant admits the allegations contained in paragraph numbered 5 of the complaint.

6. Although defendant is without actual knowledge of the facts contained in the allegations made in the first sentence of paragraph numbered 6 of the complaint, he is willing to concede their truth for

the purposes of this litigation. He is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the second sentence of paragraph numbered 6 of the complaint.

7. Defendant admits that at the time of the making of the loan alleged in paragraph numbered 6 of the complaint, plaintiff Corby was neither an officer nor director of plaintiff Acacia. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph numbered 7 of the complaint.

8. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph numbered 8 of the complaint.

9. Defendant states that the allegations contained in paragraph numbered 9 of the complaint are not relevant to this suit involving interpretation of a statute and, in any event, he is without knowledge sufficient to form a belief as to the truth of said allegations.

10. Defendant admits the existence of the statutory section noted but relies on the statute itself for the content thereof.

11. Defendant admits that he received a letter from plaintiff Acacia which is marked Exhibit "A" to the complaint. He further admits that he wrote a letter to plaintiff Acacia, which is marked Ex-

hibit "B" to the complaint. For answer to the remaining allegations contained in paragraph numbered 11 of the complaint, the defendant relies on the contents of said letters.

12. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph numbered 12 of the complaint.

13. Defendant admits that he received a letter, copy of which is marked Exhibit "C" to the complaint, and relies on the contents thereof for answer to the remaining allegations in paragraph numbered 13 of the complaint.

14 and 15. Defendant admits that he wrote a letter, copy of which is marked Exhibit "D" to the complaint. He relies on the contents of said letter for answer to the remaining allegations in paragraphs numbered 14 and 15 of the complaint.

16. Defendant admits receipt of a letter from plaintiff Acacia, which is marked Exhibit "E" to the complaint, and relies on the contents of said letter. Defendant relies on the contents of the letter marked Exhibit "D" to the complaint for answer to the first clause of the first sentence of paragraph numbered 16 of the complaint.

17. Defendant admits that he wrote a letter, marked Exhibit "F" to the complaint, and relies on the contents thereof for answer to

the remaining allegations contained in paragraph numbered 17 of the complaint.

18. Defendant admits the allegations contained in paragraph numbered 18 of the complaint.

19. Defendant admits the substance of the allegations contained in the first sentence of paragraph numbered 19 of the complaint; he says that the allegations contained in the last sentence of paragraph numbered 19 of the complaint are immaterial to the issue before the Court in the instant suit; and he denies the allegations contained in the second sentence of paragraph numbered 19 of the complaint. Further answering, the defendant avers that he never stated that he felt that he could not issue a Certificate of Authority but rather stated that he felt that he could not issue a Certificate of Compliance, since that certificate stated that defendant believed that plaintiff was complying with the law, which defendant does not believe. Further answering, defendant states that he intends to withhold the issuance of a Certificate of Compliance based on other additional facts and not solely those facts alleged in the instant complaint.

20. For answer to the allegations contained in paragraph numbered 20 of the complaint, defendant relies on Section 35-530, D. C. Code, 1967 ed.

21. For answer to the allegations contained in paragraph numbered 21 of the complaint, defendant relies on the language of Section 35-404, D. C. Code, 1967 ed., and further says that said allegations are immaterial to any issue in the instant case, especially in view of defendant's answer to paragraph numbered 19, supra.

22 and 23. Defendant states that the allegations contained in paragraphs numbered 22 and 23 of the complaint are conclusions, answer to which is not required, but if answer be required, said allegations are denied.

24. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph numbered 24 of the complaint.

25 and 26. Defendant denies the allegations contained in paragraphs numbered 25 and 26 of the complaint.

27 and 28. Defendant admits the allegations contained in paragraphs numbered 27 and 28 of the complaint.

29. Defendant denies the allegations contained in the first clause of paragraph numbered 29 of the complaint. For answer to the remaining allegations contained in paragraph numbered 29 of the complaint, this defendant relies on the language of Rule 57, Federal Rules of Civil Procedure.

Further answering the complaint, defendant denies all allegations not specifically admitted or otherwise answered.

* * * * *

[Filed March 18, 1968]

MOTION FOR SUMMARY JUDGMENT

Come now the plaintiffs, Acacia Mutual Life Insurance Company and Karl W. Corby, by their attorneys, and, pursuant to Rule 56, Federal Rules of Civil Procedure, respectfully move the Court for summary judgment in their behalf, said judgment to declare:

1. Plaintiff, Karl W. Corby, is not in violation of Section 35-530 of the District of Columbia Code by continuing to serve in his elected capacity as a director while at the same time he is one of several coprincipals on a loan which was obtained prior to his becoming a director.

2. Plaintiff, Acacia Mutual Life Insurance Company, has no right, authority, cause or duty to remove or cause the removal of plaintiff Corby from its Board of Directors.

3. Plaintiff, Acacia Mutual Life Insurance Company, is under no duty to dispose of the loan on which Karl W. Corby is one of several coprincipals and no adverse legal consequences can flow from its failure to dispose of said loan.

4. Defendant has no authority to refuse to renew either Acacia's Certificate of Authority or to grant it a Certificate of Compliance on the ground that the said Karl W. Corby continues to serve as director of Acacia while at the same time he has an interest in a loan which was made prior to the time he became a director.

As grounds for this motion the plaintiffs rely on the affidavit of Herbert E. Martin, which is attached hereto and made a part hereof as Exhibit A, and say that there is no genuine issue of material fact and they are entitled to judgment as a matter of law.

* * * * *

[Exhibit A]

AFFIDAVIT

DISTRICT OF COLUMBIA, ss:

Herbert E. Martin, Jr., being duly sworn, deposes and says as follows:

That he is Vice President and General Counsel of Acacia Mutual Life Insurance Company (hereinafter called "Acacia") and that the matters and facts set forth in this affidavit are stated by him from his own personal knowledge:

1. On April 12, 1962, Acacia made a twenty-one year mortgage loan of $288,000 to Karl W. Corby, who is engaged in the construction

business, and others, repayment to be made in monthly installments of $2,000, including interest at six per cent. The loan is fully secured by a six-story office building located at 1913 Eye Street, N. W. Karl W. Corby was neither an officer nor director of Acacia when said loan was made.

2. Karl W. Corby was elected a director of Acacia for a term of three years at the annual meeting of Acacia's policyholders held on March 21, 1967. His term will expire in March 1970, at which time he will be eligible for reelection.

3. At the time the said loan was made, its terms in all respects were in accordance with the terms generally prevailing in this area in connection with other loans of the same type and the making of the loan did not involve any special or preferential treatment.

4. Since the loan was made the payments have been made in accordance with the terms and conditions of the note and deed of trust; the repayments are current with interest paid to March 12, 1968 and the unpaid principal balance as of March 15, 1968 is $240,409.03; and, neither before nor after the election of Karl W. Corby to Acacia's Board of Directors has the loan received special or preferential treatment.

5. That the current rate of interest on loans such as described above is approximately 7 1/4% and depending on the lending institution

points may be charged. If Acacia were to dispose of this loan on this basis it would have to do so at a discount and thereby incur a substantial loss.

6. The exhibits attached to the complaint as "A" through "F" are true and correct copies of the originals of such documents contained in the files of Acacia and exhibits "C" through "F" comprise the correspondence between Acacia and defendant which occurred after Karl W. Corby's election to Acacia's Board.

7. On October 10, 1967, I was present during a conference of representatives of Acacia with the defendant and an assistant corporation counsel. During the conference the respective legal positions of the parties were fully explored and the defendant reaffirmed his earlier rulings that Acacia's holding of the loan while Karl W. Corby continued as a director of Acacia is a violation of Section 35-530 of the District of Columbia Code. He also stated that unless this matter was resolved prior to April, 1968 he would not issue a certificate to Acacia. It was my understanding that the defendant was referring to a Certificate of Authority under Section 35-404 of the District of Columbia Code. Since then I have been advised that there was a misunderstanding and that the defendant was referring to a Certificate of Compliance which he issues and which is required by other states where Acacia does business. The

substance of such certificate is that Acacia has complied with the laws of the District of Columbia.

8. Acacia does not have authority under its charter or by-laws to remove or cause the removal of a director, each of whom is elected by Acacia policyholders.

9. On February 26, 1968, the defendant issued Acacia a Certificate of Compliance, true copy of which is attached hereto, which shows that Acacia has complied with all the requirements of the laws of the District of Columbia applicable to said company except as shown on an attachment which provides:

> "Question 17 of the General Interrogatories section on page 17 of the annual statement of Acacia Mutual Life Insurance Company of 1967 shows information relating to a mortgage loan held by the company.
>
> "I believe that the loan involves a violation of section 35-530 of the D. C. Code. The company disagrees, and has instituted a declaratory judgment action in the United States District Court for the District of Columbia."

10. A Certificate of Compliance qualified as set forth above may cause the plaintiff to lose its right to do business in some or all of the states where such certificate is required.

11. Under Section 35-405(e) of the District of Columbia Code, Acacia is exposed to the loss of its Certificate of Authority, if, as defendant contends, Acacia has violated any law of the District of Columbia.

12. Under Section 35-530 of the District of Columbia Code, Karl W. Corby is guilty of a misdemeanor if he is in violation of Section 530.

/s/ Herbert E. Martin, Jr.
HERBERT E. MARTIN, JR.

* * * * *

[Filed April 17, 1968]

MOTION FOR SUMMARY JUDGMENT

The defendant moves the Court to grant summary judgment in his favor on the following ground:

The complaint, when read together with the affidavit of Albert F. Jordan, and Exhibits numbered 1 through 5, all of which are attached hereto and by reference made a part hereof, and all of the other pleadings and exhibits filed in the instant case, demonstrate that there is no genuine issue as to any material fact and that the defendant herein is entitled to judgment as a matter of law.

* * * * *

[Attached to above]

AFFIDAVIT

DISTRICT OF COLUMBIA ss:

Albert F. Jordan, being first duly sworn under oath deposes and says:

I am the Superintendent of Insurance of the District of Columbia and have been in my present position for over twenty (20) years.

During the year 1953, I was requested by the defendant for my interpretation of Section 35-530, D. C. Code, 1950 Edition, as evidenced by Exhibit 1, attached to defendant's motion for summary judgment.

In 1953, I related, by letter, to the plaintiff my interpretation of Title 35-530, D. C. Code, 1951 Edition, as revealed in Exhibit 2 attached to defendant's motion for summary judgment.

No appeal, nor in fact, any quarrel was generated as a result of my views on the statute in 1953.

Exhibits numbered 1 through 5, attached to the defendant's motion for summary judgment are true copies of letters received or sent by me and the opinion of the Corporation Counsel of the District of Columbia received by me.

I have read and agree with the affidavit of Herbert E. Martin, Jr., filed as a part of the plaintiffs' motion for summary judgment with two exceptions: (1) I do not have sufficient knowledge of the information contained in paragraph numbered 5 of the affidvait of Herbert E. Martin, Jr. and, therefore, neither agree nor disagree with it and; (2) I have not seen the exhibits attached to the complaint as "A" through "F" and, therefore, I am not in a position to agree or disagree with the statements

contained in paragraph numbered 6 of the affidavit of Herbert E. Martin, Jr.

/s/ Albert F. Jordan
ALBERT F. JORDAN

* * * * *

[Exhibit 5]

February 19, 1968

Opinion of the Corporation Counsel

IN RE: Whether section 30 of Chapter III of the Life Insurance Act prohibits a person from serving as a director of a life insurance company while there is a debtor-creditor relationship existing between such person and the company by reason of an outstanding mortgage loan made to him prior to his election to the company's board of directors.

The Board of Commissioners on October 19, 1967 referred to me a request of the Superintendent of Insurance for an opinion as to whether a person may serve as a director of Acacia Mutual Life Insurance Company while there is a debtor-creditor relationship existing between that person and the company by reason of an outstanding mortgage loan made prior to his election to the company's board of directors.

On April 12, 1962, Acacia Mutual Life Insurance Company made a mortgage loan of $288,000 to Karl W. Corby Construction Corporation, Karl W. Corby and Company, Inc., and Karl W. Corby, Edward M.

Castle and William B. Asher, as individuals. The loan is for a twenty-one year period and as of September 30, 1967 the balance due was $245,114. On March 21, 1967, Mr. Corby was elected by the policyholders of Acacia to its board of directors, giving rise to the instant question of whether, in view of the prohibition contained in section 30 of Chapter III of the Life Insurance Act, he can continue to serve as a director of the company.

Section 30 of Chapter III of the Life Insurance Act (D. C. Code, sec. 35-530) in pertinent part provides that--

> "No director or officer of any [domestic life insurance] company doing business in the District shall receive any money or valuable thing for negotiating, procuring, recommending, or aiding in any purchase by or sale to such company of any property, or any loan from such company, nor be pecuniarily interested, either as principal, co-principal, agent, or beneficiary, in any such purchase, sale or loan, nor shall the financial obligation of any such director or officer be guaranteed by such company in any capacity. . . . Any person violating any provision of this section shall be guilty of a misdemeanor." (Emphasis and bracketed language supplied)

Acacia, in a memorandum to the Superintendent of Insurance, has stated that it does not believe that the above-cited section applies to an officer or director who became such subsequent to the making of the loan, but only to those persons who were officers or directors of an insurance company at the time the company made the loan.

I am not persuaded by the reasoning of this memorandum. The statute must be read in light of the problems that it was designed to resolve. One primary problem is conflict of interest. Mr. Corby is simultaneously a debtor and a fiduciary of the creditor corporation. He cannot consistently serve these potentially diverse interests. The language of the statute states that "No director" may be "pecuniarily interested, either as principal, co-principal, agent, or beneficiary . . . in any. . . loan. . . [from the life insurance company of which he is a director]." Karl W. Corby, as President of Karl W. Corby Construction Corporation, Karl W. Corby & Company, and as an individual, is pecuniarily interested both as a principal and as a beneficiary in the loan from Acacia. The relationship presently exists, and it is my opinion that the sequence in which the relationship arose is immaterial.

The latter portion of section 30 of Chapter III provides:

> "Provided further, That nothing herein contained shall prevent a life insurance company from making a loan upon a policy held therein by a director not in excess of the net value thereof."

Any doubt that may arise is cleared by this provision, for it permits as the sole exception, loans made to the director on his life insurance policies and limited to their net value. This provision was doubtless necessary in order to give a director the same rights as those available to the ordinary policy-holder with accumulated equity.

In short, I consider the first portion of section 30 of Chapter III of the Life Insurance Act as setting forth a number of activities in which a director of a domestic life insurance company may not be engaged, including the activity of being pecuniarily interested in a loan from the company. The proviso sets forth the sole exception: that a director of a life insurance company may obtain from it a loan not exceeding the net value of any insurance policy issued to the director by the company.

I therefore conclude that the provisions of section 30 of Chapter III of the Life Insurance Act preclude a person from serving as a director of a life insurance company while there is a debtor-creditor relationship existing between that person and the company by reason of an outstanding mortgage loan made prior to his election to the board of directors.

* * * * *

[Filed April 23, 1968]

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiffs, by their attorneys, hereby oppose defendant's motion for summary judgment. For its opposition the plaintiffs will rely on their motion for summary judgment, the affidavit submitted in support thereof and the affidavit of C. Turner Hudgins, which is attached hereto and made a part hereof.

* * * * *

[Attached to above]

AFFIDAVIT OF C. TURNER HUDGINS

DISTRICT OF COLUMBIA, ss:

I, C. Turner Hudgins, being duly sworn, depose and say as follows:

I am an adult, a citizen of the United States, and a resident of Fairfax, Virginia.

I have been employed by Acacia Mutual Life Insurance Company for 20 years, my employment having begun in 1947. I am a member of the bars of the District of Columbia and the State of Virginia and I have been an appointed officer of Acacia Mutual Life Insurance Company since 1953 with my appointment as Associate General Counsel being made October 1, 1963.

Attached to the affidavit of defendant, Albert F. Jordan, are letters dated December 16, 1953, and December 9, 1953, which relate to an interpretation by defendant Jordan of Title 35-530 of the D. C. Code. I am the C. T. Hudgins referred to in the second paragraph of the letter of December 9, 1953. The three loans referred to in this paragraph were all secured by single family residences occupied by employees of the Company who became officers in 1953. The unpaid principal balance of the three loans as of December 31, 1953, was as follows:

C. T. Hudgins	-	$ 11,794.21
H. S. Browne	-	10,094.50
C. M. Gaines	-	6,699.55

Management of Acacia, while not in agreement with the opinion of Superintendent Jordan as specified in his letter of December 16, 1953, decided not to contest such opinion primarily for the reason that the loans were relatively small and could be disposed of on the market without discount. As a matter of fact these loans were sold as of December 31, 1953 without discount and with accrued interest to that date.

Examiners representing insurance departments of the District of Columbia and six states conducted a triennial examination of Acacia in 1965 covering the period January 1, 1962 through December 31, 1964. During this examination the examiners found that two of Acacia's officers owned residential properties on which Acacia held mortgage loans. The examiners recited and reported with respect to these two loans as follows:

> In reviewing the mortgage loan records it was noted that two of the company's officers had loans with the company at December 31, 1964. One of the loans was assumed in September, 1957 by a currently elected officer and the other was assumed in 1960 by a currently appointed officer, both of whom had an employee status at the time of assumption. One property is the residence for the habitation of the officer, the other is not. Both loans were originally made in 1956.

The report made no criticism of Acacia with respect to these loans and made no requirement for removal of these loans from its portfolio, nor did the Superintendent for the District of Columbia or any member of his Department make any requirement with respect to these loans.

Annual statements submitted by life insurance companies are on forms as required by the insurance departments of the state of domicile of the company. These annual statement forms are basically uniform and have been adopted by the National Association of Insurance Commissioners. There may be modifications on some of the forms to comply with requirements of individual states. Question 17 on page 17 of the annual statement reads as follows:

> "Total amount loaned during the year to directors or other officers $_____, to stockholders not officers, $_____. Total amount of loans outstanding at end of year to directors or officers $_____, to stockholders not officers $_____ (exclusive of policy loans)."

I have examined the annual statements of domestic life insurance companies of some of the other states and the insurance codes of these states. Some of the states have statutes similar to Section 35-530 of the District of Columbia Code. The annual statements of some of the companies show outstanding loans to persons who are either officers or

directors with or without an explanation of these loans. Involved in the examination were annual statements for the years 1965, 1966 and 1967 of California-Western States Life Insurance Company of Sacramento, California, Southwestern Life Insurance Company of Dallas, the Lincoln National Life Insurance Company of Fort Wayne, Indiana, the Life Insurance Company of Virginia, Jefferson Standard Life Insurance Company of North Carolina, Occidental Life Insurance Company of California and New York Life Insurance Company of New York. These companies in answering question 17 on page 17 of their annual statements show as follows:

1. California-Western States Life Insurance Company 1965 - Total amount of loans outstanding at end of year to directors or other officers - $63,474.59 1966 - Total amount of loans outstanding at end of year to directors or other officers - $55,688.58 1967 - Total amount of loans outstanding at end of year to directors or other officers - $53,188.71 There is a footnote following each of the amounts shown reading: "Loans made to employees prior to their election as officers."

2. Occidental Life Insurance Company of California 1965 - Total amount of loans outstanding at end of year to directors or other officers - $178,537.84 1966 - Total amount of loans outstanding at end of year to directors or other officers - $100,312.75 1967 - Total amount of loans outstanding at end of year to directors or other officers - $147,270.68 There is a footnote following each of the amounts shown reading: "Loans made to employees prior to their election as officers."

A true copy of Section 1101 of the California Insurance Code is attached hereto as item 1 and incorporated herein.

3. Lincoln National Life Insurance Company of Indiana
1965 - Total amount of loans outstanding at end of year to directors or other officers - $143,289.73
1966 - Total amount of loans outstanding at end of year to directors or other officers - $130,939.05
1967 - Total amount of loans outstanding at end of year to directors or other officers - $112,939.79
These amounts are not footnoted on the annual statement.

A true copy of Section 39.3715 of the Indiana Insurance Code is attached hereto as item 2 and incorporated herein.

4. New York Life Insurance Company of New York
1965 - Total amount of loans outstanding at end of year to directors or other officers - $87,135.47
1966 - Total amount of loans outstanding at end of year to directors or other officers - $80,281.36
1967 - Total amount of loans outstanding at end of year to directors or other officers - $60,601.74
There is no footnote to these amounts. However, question 17 on the statement for each of the years has added language reading: "The amount shown represents the balance of mortgage loans made to employees before they became officers."

A true copy of Section 78(4) of the New York Insurance Law is attached hereto as item 3 and made a part hereof.

5. Jefferson Standard Life Insurance Company of Greensboro, N. C.
1965 - Total amount of loans outstanding at end of year to directors and other officers - $30,158.90
1966 - Total amount of loans outstanding at end of year to directors and other officers - $102,426.93

1967 - Total amount of loans outstanding at end of year to directors and other officers - $142,708.76
There is a footnote to these amounts reading "Mortgage loans made before elected."

A true copy of Section 58-79(3) of the North Carolina Insurance Law is attached hereto as item 4 and made a part hereof.

6. Southwestern Life Insurance Company of Dallas, Texas
1965 - Total amount of loans outstanding at end of year to directors or other officers - $68,173.63
1966 - Total amount of loans outstanding at end of year to directors or other officers - $62,195.49
1967 - Total amount of loans outstanding at end of year to directors or other officers - $46,149.91
There is no footnote as to these amounts for the years 1965 and 1966. However, the amount shown for 1967 is footnoted "Loans were made prior to becoming an officer."

A true copy of Article 3.67 of the Texas Insurance Code is attached hereto as item 5 and made a part hereof.

7. Life Insurance Company of Virginia
1965 - Total amount of loans outstanding at end of year to directors or other officers - $120,181.12
1966 - Total amount of loans outstanding at end of year to directors or other officers - $127,883.27
1967 - Total amount of loans outstanding at end of year to directors or other officers - $148,053.96
There is no footnote as to these amounts.

A true copy of Section 38.1-34 of the Virginia Insurance Code is attached hereto as item 6 and made a part hereof.

My examination of the annual statements for 1965, 1966 and 1967 showed that none of said companies in answering the first part of question 17 reading "Total amount loaned during the year to directors or other officers $ ", showed any amounts.

I know of no instance where the Insurance Commissioners of any of the said states have questioned the legality of the loans so described.

/s/
C. TURNER HUDGINS

* * * * *

[Item 1]

1101. An admitted insurer's officers, directors, trustees and any persons who have authority in the management of the insurer's funds, shall not, unless otherwise provided in this code:

(a) Receive any money or valuable thing for negotiating, procuring, recommending or aiding in, any purchase by or sale to such insurer of any property, or any loan from such insurer.

(b) Be pecuniarily interested as principal, co-principal, agent, attorney or beneficiary, in any such purchase, sale or loan.

(c) Directly or indirectly purchase, or be interested in the purchase of, any of the assets of the insurer.

* * * * *

[Item 2]

39.3715. Loans to officers and directors. - Any board of directors, director or officer of any insurance company doing business in this state, who shall directly or indirectly, loan any of its funds, moneys, capital or other property whatsoever, to any director or officer of such insurance company doing business in this state, or any director or officer who shall borrow from such insurance company any of its funds, moneys, capital or other property whatsoever, shall be deemed guilty of a misdemeanor, and shall, upon conviction, be fined not less than one hundred dollars [$100] nor more than five hundred dollars [$500], and be imprisoned in the county jail not less than thirty [30] days nor more than six [6] months: Provided, however, That nothing herein shall have application to, or prevent any life insurance company from making a loan to any director or officer of such insurance company upon a policy held therein by the borrower not in excess of the net cash surrender value thereof. [Acts 1935, ch. 162, § 93, p. 588.]

* * * * *

[Item 3]

78(4). No director or officer of an insurer doing business in this state shall receive, in addition to his fixed salary or compensation, any money or valuable thing, either directly or indirectly, or through any substantial interest in any other corporation or business unit, for negotiating, procuring, recommending or aiding in any purchase or sale of property, or loan, made by such insurer or any affiliate or subsidiary thereof; nor shall he be pecuniarily interested, either as principal, co-principal, agent or beneficiary, either directly or indirectly, or through any substantial interest in any other corporation or business unit, in any such purchase, sale or loan. This subsection shall not prohibit a member of the board of directors of an insurer, other than life, from receiving his share of the usual commission earnings of a stock exchange firm of which he is a partner. Nothing contained herein shall prohibit an insurer, other than life, or any life insurance company all of the stock of which (except qualifying shares of directors) is owned by any corporation organized primarily for the purpose of, and engaged primarily in the business of, providing support, relief, pensions, annuities or insurance for the priests, clergy or ministers of any religious denomination or for those dependent on them, from paying any corporation or any partnership in which one or more of their directors has an interest or in which one or more of their directors is an officer or director or partner a reasonable fee for investment advice, provided such compensation is not in excess of the amounts customarily charged for the same type of service.

* * * * *

[Item 4]

58-79(3). No life insurance company doing business in this State shall make any loan to any director or officer of such insurer, either directly or indirectly; nor shall such insurer make any loan to any other corporation or

business unit in which such officer or director is substantially interested; nor shall any such director or officer accept any such loan directly or indirectly.

No director or officer of any such insurance company doing business in this State shall receive any money or valuable thing either directly or indirectly, or through any substantial interest in any other corporation or business unit, for negotiating, procuring, recommending or aiding in any purchase or sale of property or loan from such insurer nor be pecuniarily interested either as principal, coprincipal, agent or beneficiary, in any such purchase, sale or loan, nor shall any financial obligation of any such director or officer be guaranteed by such insurer.

Nothing contained in this section shall be construed as prohibiting a director or officer of any such insurance company or fraternal benefit society from receiving the usual salary, compensation or emoluments for services rendered in the ordinary course of his duties as a director or officer, if such salary, compensation or emoluments be authorized by vote of the board of directors of such insurer, nor as prohibiting the payment to a director or officer of any such insurer who is a licensed attorney at law of a fee or fees in connection with loans made by any such insurer, if and when such fees are paid by the borrower and do not constitute a charge against any such insurer; and, provided, that nothing herein contained shall prevent a life insurance corporation from making a loan upon a policy held therein by the borrower not in excess of the net value thereof.

A substantial interest in any corporation or business unit is defined to mean an interest equivalent to ownership or control by a director or officer or the aggregate ownership or control by all directors and officers of the same insurance or surety company or fraternal benefit society, of ten per centum or more of the stock of such corporation or business unit.

* * * * *

[Item 5]

Art. 3.67. Director Not to Do Certain Things

No director or officer of any insurance company transacting business in or organized under the laws of this State, shall receive any money or valuable thing for negotiating, procuring, recommending or aiding in any purchase or sale by such company of any property, or any loan from such company, nor be pecuniarily interested, either as principal, co-principal, agent or beneficiary in any such purchase, sale or loan. Nothing in this article shall prevent a life insurance corporation from making a loan upon a policy held therein, by the borrower, not in excess of the reserve value thereof.

* * * * *

[Item 6]

§ 38.1-34. Other interests of officers, directors, etc., prohibited. --

No officer or director of any such insurance company doing business in this State shall receive any money or valuable thing, either directly or indirectly or through any substantial interest in any other corporation or business unit for negotiating, procuring, recommending, or aiding in any purchase or sale of property by such company, or in obtaining any loan from such company, nor be pecuniarily interested, either as principal, co-principal, agent, or beneficiary, in any such purchase, sale or loan; nor shall the financial obligation of any such officer or director be guaranteed by such company. (Code 1950, § 38-4.2: 1952, c. 317.)

* * * * *

[Filed May 10, 1968]

ORDER

This cause having come on for hearing on plaintiffs and defendant's motions for summary judgment and the court having considered the said motions and the affidavit and memoranda in support thereof and in opposition thereto, and, after full argument, it appearing to the court that there is no genuine issue of material fact and that the plaintiffs are entitled to judgment as a matter of law with respect to their claims, it is by the court this 10th day of May, 1968,

ORDERED, That the plaintiffs' motion for summary judgment be and it is hereby granted and, it is,

FURTHER ORDERED, That defendant's motion for summary judgment be and it is hereby denied.

/s/ Alexander Holtzoff
JUDGE

* * * * *

[Filed May 10, 1968]

ORAL OPINION OF THE COURT

THE COURT: The question presented in this case is whether a person who has borrowed money from a District of Columbia insurance company is eligible to become a member of the board of directors or

an officer of the insurance company while the loan is outstanding. The question depends upon a construction of one of the provisions of the Code of the District of Columbia relating to insurance companies.

The facts out of which this question arises are few and undisputed. On April 12th, 1962 plaintiff Acacia Mutual Life Insurance Company made a loan of $288,00[0], secured by a mortgage, on an office building in the District of Columbia, to a number of persons, including the plaintiff Karl W. Corby. The loan was for 21 years.

On March 21st, 1967, five years later, while the loan was still outstanding but in current condition, the plaintiff Corby was elected a member of the board of directors of Acacia.

The question is whether he is eligible to that office.

The Superintendent of Insurance of the District of Columbia has indicated that in his opinion plaintiff Corby is not eligible to fill the office of director in the light of the foregoing circumstances and has indicated that he would consider withdrawing necessary annual certificates from Acacia if the situation continues.

Acacia takes the position that the statutory prohibition bars a director or an officer from borrowing money from his insurance company but does not relate or include situations where a person who has borrowed money from the insurance company later becomes a director or an officer while the loan is still outstanding.

This action was brought by the two plaintiffs against the Superintendent of Insurance for a declaratory judgment and is before the Court at this time on cross motions for summary judgment.

The Corporation Counsel, who represents the defendant, with commendable candor concedes that there is a justiciable controversy in view of the possible sanctions that may be applied to the insurance company and the serious consequences that may result from them.

The answer to the question or the solution of the problem here presented depends upon a construction of the applicable statute, which is found in District of Columbia Code, Title 35, Section 530. It reads as follows:

> "No director or officer of any company doing business in the District shall receive any money or valuable thing for negotiating, procuring, recommending, or aiding in any purchase by or sale to such company of any property, or any loan from such company, nor be pecuniarily interested, either as principal, coprincipal, agent, or beneficiary, in any such purchase, sale, or loan, nor shall the financial obligation of any such director or officer be guaranteed by such company in any capacity: Provided, That nothing herein contained shall prevent any such director or officer from receiving a fee for appraising property for said company or for serving on any committee that passes on the investments of said company: Provided further, That nothing herein contained shall prevent a life insurance company from making a loan upon a policy held therein by a director not in excess of the net value thereof.

> Any person violating any provisions of this section shall be guilty of a misdemeanor."

It is natural for the Superintendent of Insurance, who is an efficient, enlightened and dedicated public servant, to adopt such a construction of the statute as in his opinion would best effectuate its purposes and best protect the interests of the insurance company, its policyholders and the community. He is to be commended for this attitude. The Court, however, must construe the statute.

At the outset it must be emphasized that a criminal penalty is attached to the statute and, therefore, it must be treated as a penal statute.

It is fundamental that penal statutes must be strictly construed. This rule does not mean that the narrowest and strictest possible interpretation must be put on a penal statute that might completely defeat the purpose of Congress and devitalize the provisions. It does mean, however, that while the courts should put a reasonable construction on a penal statute, nevertheless it should not be broadly or liberally construed but should be interpreted in a narrow and strict manner because of the criminal penalty that may be imposed for its violation.

An entirely different problem might have been presented here if the statute was a purely regulatory measure and contained no sanctions

but those of a civil nature and perhaps vested in the Superintendent the authority and power to promulgate regulations that would interpret the Act. This is not such a case.

Bearing in mind the principle to which reference has just been made, that penal statutes must be strictly construed, it is necessary to proceed to analyze the Act.

There are two separate aspects to this statutory provision. The first is to the effect that no director or officer of any company doing business in the District shall receive any money or valuable thing for negotiating, procuring, recommending or aiding in any purchase by, or sale to, such company of any property or any loan from such company. The other provision is that he shall not be pecuniarily interested, either as principal, co-principal, agent or beneficiary, in any such purchase, sale or loan. It is well to consider these two parts of the statute separately.

The first part of the statute is itself susceptible to more than one construction. One way to read that clause is as follows:

> "No director or officer of any company doing business in the District shall receive any money or valuable thing for negotiating, procuring, recommending or aiding in . . . any loan from such company."

The meaning of the provision, if so read, is that a director or officer may not receive any compensation or fee or commission for procuring a loan to be made.

There is another way of reading that provision and it is as follows:

> "No director or officer of any company doing business in the District shall receive . . . any loan from such company."

The first of these two constructions would adopt too narrow a view because it is quite apparent that Congress intended to reach at least two results. One was to bar a director or officer from receiving any compensation, such as broker's commissions, for procuring a loan to be made. The other was - and perhaps a more important one - to prevent a director or officer of an insurance company from borrowing any money from the insurance company while he was a director or officer.

The second part of the statute bans a director or officer of any insurance company from being "pecuniarily interested, either as principal, co-principal, agent or beneficiary, in any such purchase, sale or loan." This clause is clearly ambiguous and indefinite. What is meant by being pecuniarily interested in a loan either as principal, co-principal, agent or beneficiary? Does it mean and does it relate to the transaction of lending money, or does it have a broader scope and apply to

the status of a loan so as to be applicable during the entire period that the loan is in existence?

Bearing in mind that, as stated heretofore, penal statutes should be narrowly construed, the Court is of the opinion that the first of these two constructions should be adopted.

In addition to the requirement of narrow construction of penal statutes we must apply another principle, that ambiguities in a penal statute should be resolved in favor of a person who is affected by it, in view of the basic doctrine that a criminal penalty shall not be imposed on anyone for some violation that is not clearly accentuated in the statute.

In the light of these considerations the Court construes this statute, insofar as the question involved in this case is concerned, as containing two prohibitions. One is that no director or officer of any company doing business in the District of Columbia shall receive any compensation, such as broker's commission or fee, for negotiating or procuring a loan from the company with which he is so connected; second, that no director or officer may receive any loan from the company of which he is such a director or officer. It does not bar a person who had previously received a loan from the company from later on becoming a director or officer, even though the loan is still outstanding.

The conclusion necessarily follows that the plaintiff Corby was eligible to be elected to the Board of Directors of Acacia and is eligible to continue as such.

The plaintiffs' motion for summary judgment is granted and the defendant's cross-motion is denied.

Counsel may submit a proposed order in accordance with this ruling.

* * * * *

[Filed June 10, 1968]

NOTICE OF APPEAL

Notice is hereby given this 10th day of June 1968 that defendant Albert F. Jordan hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the judgment of this Court entered on the 10th day of May 1968 in favor of plaintiffs Acacia Mutual Life Insurance Company and Karl W. Corby against said defendant Albert F. Jordan.

* * * * *

Regular

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 22,139

ALBERT F. JORDAN, individually, and as
Superintendent of Insurance of the
District of Columbia,

Appellant,

v.

ACACIA MUTUAL LIFE INSURANCE COMPANY,
a corporation chartered by the
Congress of the United States in 1869,
and
KARL W. CORBY,

Appellees.

Appeal From The United States District Court
For The District Of Columbia

CHARLES T. DUNCAN,
Corporation Counsel, D. C.

HUBERT B. PAIR,
Principal Assistant Corporation
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ISSUE PRESENTED FOR REVIEW

In the opinion of the District of Columbia Superintendent of Insurance, the issue presented for review is:

Was there not a rational basis for the long-continued administrative interpretation that a person who has borrowed money from a District of Columbia insurance company may not, while the loan remains unpaid, become a member of the board of directors of such insurance company?

This case has not been before the Court on any prior occasion.

I N D E X

Page

SUBJECT INDEX

CASES CITED

UNITED STATES CODE CITED

DISTRICT OF COLUMBIA CODE, 1967, CITED

ACT OF CONGRESS CITED

OTHER AUTHORITIES CITED

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* Cases and authorities chiefly relied upon are marked by asterisks.

UNITED STATES COURT OF APPEALS
For The District Of Columbia

No. 22,139

ALBERT F. JORDAN, individually, and as
Superintendent of Insurance of the
District of Columbia,

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v.

ACACIA MUTUAL LIFE INSURANCE COMPANY,
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Congress of the United States in 1869
and
KARL W. CORBY,

Appellees.

Appeal From The United States District Court
For The District Of Columbia

BRIEF FOR APPELLANT

STATEMENT OF THE CASE

Preliminary Statement

This is an appeal from a final order of the United States District Court for the District of Columbia entered May 10, 1968, in an action for declaratory and injunctive relief brought pursuant to § 11-521, D. C.

Code (1967), 28 U. S. C. §§ 2201 and 2202, and Rule 57 of the Federal Rules of Civil Procedure (A. 2, 50). The case came on before the court on cross-motions for summary judgment following which the court entered judgment in behalf of the Acacia Mutual Life Insurance Company and its Director, Karl W. Corby. The court rendered an oral opinion in support of its ruling. (A. 28, 33, 50.) Notice of appeal was filed on June 10, 1968 (A. 57).

Statement of Relevant Facts

In 1953, the Acacia Mutual Life Insurance Company sought from the District of Columbia Superintendent of Insurance an opinion as to whether, under D. C. Code, § 35-530, a person indebted to a local insurance company could be an officer of that company where the indebtedness was incurred prior to his appointment as an officer (A. 12, 13). The Superintendent advised Acacia that, under his interpretation of the statute, a person could not be an officer of an insurance company to which he was indebted regardless of the time the debt was incurred (A. 13-15).

Thereafter, in April 1961, Acacia made a 21-year mortgage loan of $288,000 to Karl W. Corby, and others, repayable in monthly installments of $2,000, with interest at 6%. On March 21, 1967, Corby was elected a member of Acacia's Board of Directors and

presently serves in that capacity. On June 26, 1967, Acacia again requested the Superintendent's interpretation of § 35-530, D. C. Code, 1967, and inquired whether the debtor-creditor relationship between it and Corby precluded Corby's membership on its Board of Directors in view of the fact that the loan antedated commencement of the directorship. Consistent with his 1953 opinion, the Superintendent ruled that it was statutorily impermissible for a person to serve as a director of a local insurance company at a time when he had a loan outstanding to that company, irrespective of when such indebtedness arose. (A. 15-21.)

In their complaint which followed, Acacia and its director challenged the Superintendent's interpretation of the applicable statute, asserting that it was the Superintendent's stated intention to refuse to renew Acacia's certificate of authority unless the loan to Corby was disposed of or the matter otherwise resolved prior to April 1968 (A. 2-11).

In its oral opinion, the court reviewed the applicable statute, noting that it contained a provision whereby a person violating it is guilty of a misdemeanor. For this reason, the court was of the view that a strict construction of the statute was required. In the opinion of the court, the statute thus construed did not apply to a person who became a director of an insurance company after his indebtedness to that company was incurred, even though the indebtedness remained out-

standing after his election to the Board of Directors. However, the court hastened to state that:

> "An entirely different problem might have been presented here if the statute was a purely regulatory measure and contained no sanctions but those of a civil nature and perhaps vested in the Superintendent the authority and power to promulgate regulations that would interpret the Act. * * * " (A. 53-54.)

This appeal followed (A. 57).

SUMMARY OF ARGUMENT

From both the title and the body of § 35-530, D. C. Code, 1967, it is plain that the statute imposes an across-the-board rule whereby a director of a local insurance company shall at no time and under no circumstances be "pecuniarily interested" in any loan of the company. The statute therefore prohibits a person from serving as a director of a company and, at the same time, having an outstanding indebtedness to the company, and the fact that the indebtedness commenced before his election as a director is immaterial. The Superintendent of Insurance has interpreted the statute to be applicable to this precise fact situation for many years. Because this long-standing administrative interpretation has a rational basis in law, it must be judicially accepted, though it may not be the only reasonable one, and though it may not be

the one that the court would have reached had it been called upon to decide the question in the first instance.

The circumstance that persons violating § 35-530 are guilty of a misdemeanor does not require that the statute be given a strict construction. Its dominating theme is not penal, but highly regulatory and remedial. In view of both this factor and the nature of the business regulated, a liberal construction is required. In addition, the application of the statute is not now sought in a criminal proceeding designed to invoke the penalty, but rather in a civil proceeding designed to remedy a conflict of interest for the public good.

ARGUMENT

The court below misconstrued the applicable statute and erroneously entered judgment in behalf of Acacia and its director.

The key facts, briefly stated, are that, in April 1967, the Acacia Mutual Life Insurance Company made a 21-year mortgage loan to Karl W. Corby, and others, repayable in monthly installments, with interest at 6%. Thereafter, while still indebted to Acacia, Corby was elected to its Board of Directors. The relationship thus created was questioned by the Superintendent of Insurance under § 35-530, D. C. Code, 1967, which provides:

> "No director or officer of any company doing business in the District shall receive any money or valuable thing for negotiating, procuring, recommending, or aiding in any purchase by or sale to such company of any property, or any loan from such company, nor be pecuniarily interested, either as principal, coprincipal, agent, or beneficiary, in any such purchase, sale or loan, nor shall the financial obligation of any such director or officer be guaranteed by such company in any capacity: Provided, That nothing herein contained shall prevent any such director or officer from receiving a fee for appraising property for said company or from serving on any committee that passes on the investments of said company: Provided further, That nothing herein contained shall prevent a life insurance company from making a loan upon a policy held therein by a director not in excess of the net value thereof. Any person violating any provision of this section shall be guilty of a misdemeanor." [Emphasis added.]

In ruling in behalf of Acacia and its director, the court below concluded that this provision did not extend to an individual whose debt to the company antedated the commencement of his directorship, thereby rejecting the administrative interpretation placed on § 35-530 by the Superintendent since 1953. This was plain error.

The above-quoted provision is contained in the 1934 "Act to regulate the business of life insurance in the District of Columbia," 48 Stat. 1125 et seq. In furtherance of the public welfare, Congress inserted in this Act a host of regulatory provisions relating to the capital stock requirements of companies, the licensing of agents, the ad-

mission to the District of foreign companies, the protective clauses to be set forth in the policies, and numerous other facets of the life insurance business in the District of Columbia. See §§ 35-301 through 35-803, D. C. Code, 1967; Senate Report No. 1420, 73rd Cong., 2d Sess.; House of Representatives Report No. 1526, 73rd Cong., 2d Sess.

Like other statutes regulating the insurance business, the Act was manifestly enacted to insure the solvency of companies and to require such companies to conform to high standards of fairness in their dealings with both the public and the policy holder. Cf. 2 Couch, Cyclopedia of Insurance Law, 2d Ed., § 21:1; Vance on Insurance, 3rd Ed., (1951), § 5. This kind of legislation obviously serves to regulate a business greatly impressed with the public interest. United States v. Southeastern Underwriters Association, 322 U. S. 533, 544 (1944); German Alliance Ins. Co. v. Kansas, 233 U. S. 389, 414-15 (1914). Its important remedial objective unquestionably requires that it be liberally construed. In Sutherland, Statutory Construction, § 7105, 3rd Ed. (1932), Vol. 3, Horack, it is stated that:

> " * * * Comprehensive legislation regulating the activities of insurers, having as its objective the protection of the public and those insured, has become very common in the United States. In keeping with the judicial policy of construing insurance policies in favor of the insured, legislation enacted for the purpose of his protection

> has usually been liberally construed in favor of the public and the insured. * * * " [Footnotes omitted; emphasis added.]

The particular provisions of the statute here involved are not limited to the concept that directors, while actually possessing that status, shall not borrow money from their companies. Its clear command goes considerably further and states that directors shall not "be pecuniarily interested" in any loans or other transactions of the companies which they serve in a fiduciary capacity. This point is under scored by the Section's title, which reads: "OFFICERS AND DIRECTORS ARE NOT TO BE PECUNIARILY INTERESTED IN TRANSACTIONS." 48 Stat. 1151. The title of a statute or one of its subsections is always a useful aid in ascertaining the intent of the legislature. Federal Trade Commission v. Mandel Brothers, Inc., 359 U. S. 385, 388-89 (1959); Shropshire, Woodliff & Co. v. Bush, 204 U. S. 186 (1907); Knowlton v. Moore, 178 U. S. 41, 65 (1900); Clawans v. Sheetz, 67 App. D. C. 366, 370, 92 F. 2d 517, 521 (1937). Clearly, therefore, the notion conveyed by both the title of § 35-530, supra, and its plain terms is that the elements of a directorship of an insurance company and an outstanding debt to that company cannot coalesce in the same person at the same time. In short, § 35-530 embraces any debtor relationship between a director and his company, irrespective of the chronological sequence in which that relationship arises.

Since 1953, that precise construction has been placed on § 35-530 by the Superintendent of Insurance (A. 12-15). It is well settled that a long-continued contemporaneous and practical interpretation of a statute by the official charged with its administration and enforcement constitutes an invaluable aid in determining its meaning. See Sutherland, Statutory Construction, § 5103, 3rd Ed. (1943), Vol. 2, Horack. This principle has taken on such significance that both the Supreme Court and this Court have held that such administrative interpretation of a statute must be judicially accepted, even though the Court would have given the statute a different construction, were it called upon to construe the statute in the first instance. Thus, in Udall v. Tallman, 380 U. S. 1, 16 (1965), the Supreme Court said:

> "When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. 'To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.' * * * " [Emphasis added.]

In Philadelphia Television Broadcasting Co. v. F. C. C., 123 U. S. App. D. C. 289, 359 F. 2d 282 (1966), this Court made a like pronouncement (123 U. S. App. D. C. at 299) and went on to point out

that the principle is even more applicable where there is an absence of legislative history, stating:

> "We think such deference to the agency's interpretation of its governing statute is reinforced where, as here, the legislative history is silent, or at best unhelpful, with respect to the point in question. * * *" (Id. at p. 300.)

It is not without significance that the legislative history of the Act is silent "with respect to the point in question," likewise reinforcing deference to the Superintendent's long-standing administrative interpretation of § 35-530.

The Superintendent's interpretation is manifestly designed to prevent directors of insurance companies from occupying preferential positions with respect to financial obligations of their companies. A director who is substantially indebted to his company occupies a preferential position from which he may readily influence the company's forbearance should his indebtedness become delinquent, even though he was not a director when such indebtedness arose. It is not unreasonable to interpret § 35-530 to safeguard against this kind of potential threat, irrespective of any actual violation of a director's trust in a particular case. As was said in United States v. Mississippi Valley Co., 364 U. S. 520, 550 (1961), "the statute is more concerned with what might have happened in a given situation than with what actually

happened." In that case, the Supreme Court made it clear that a conflict of interest statute like that in question may reasonably be interpreted to impose rigid standards of conduct, in spite of the fact that it imposes a criminal penalty. And it must be remembered that a director of an insurance company acts in a fiduciary capacity and is indeed a trustee. His debtor-creditor relationship with the same company is antagonistic to the continuing effectiveness of his trust. Cf. Meinhard v. Salmon, 249 N. Y. 458, 164 N. E. 545, 546 (1928).

The lower court's construction of § 35-530 breeds anomalous consequences, for it permits insurance companies to make incentive loans to prospective directors by the simple device of briefly deferring the commencement of their directorships. It likewise permits loans to directors during a period elapsing between the termination of one directorship and the commencement of another. Manifestly, any construction of a statute that will facilitate its evasion is not to be favored. Consonant with this proposition, the Superintendent's interpretation of § 35-530 gives rise to an across-the-board rule under which collusive actions between the directors and their companies simply cannot occur.

Clearly the Superintendent's long-standing interpretation of § 35-530 has a rational basis. Consequently, it was arbitrarily rejected by the court below. It is of no significance that the Superintendent's interpretation may not be the only reasonable one or even the

one that this Court would have adopted "had the question arisen in the first instance in judicial proceedings." Udall v. Tallman, supra; Philadelphia Television Broadcasting Co. v. Federal Communications Commission, supra.

The court below in effect recognized the reasonableness of the Superintendent's interpretation when it noted that such an interpretation might well be proper if Congress had not provided in § 35-530 that those violating its terms are guilty of a misdemeanor (A. 53-54). In view of that circumstance, however, the court felt that a strict construction of the statute was required. A careful analysis of this position discloses that it is clearly untenable.

The rule that statutes imposing criminal penalties should be strictly construed is not an inexorable command to the judiciary, but, rather, one of many guides to be considered in ascertaining the intent of the legislature. It is axiomatic that where the dominant theme of a statute is to regulate a certain subject matter in the public interest, rather than to inflict a criminal penalty, the rule of strict construction will not be given effect. And this is so even though the statute may incidentially impose penalties on those violating it. Johnson v. Southern Pacific, Co., 196 U. S. 1, 17 (1904); Northern Securities Co. v.

United States, 193 U. S. 197, 359 (1904); United States v. Stowell, 133 U. S. 1, 12 (1889); cf. SEC v. Joiner Corp., 320 U. S. 344, 353-54 (1943); District of Columbia v. Horning, 47 App. D. C. 413, 423 (1918), aff'd 254 U. S. 135 (1920).

As previously pointed out, the dominant theme of the statute involved is highly remedial and regulatory. The legislative purpose is not so much to punish as to regulate a business for the common good. Certainly then § 35-530 should be liberally construed. What was said by this Court in District of Columbia v. Horning, supra, is apposite here:

> "The statute here is not aimed at the prohibition of a well-defined act which is in itself criminal, but at the regulation of a business which, if conducted in a manner prohibited by the statute, is declared to be against public policy, and which subjects the person engaging therein to the penalties prescribed in the act. * * * The rule of strict construction as applied to criminal statutes is relaxed in the interpretation of an act designed to declare and enforce a principle of public policy. * * * " (47 App. D. C. at 423.)

In addition, the proceeding below was not a criminal prosecution designed to invoke the penalty set forth in § 35-530. It was a civil proceeding concerned exclusively with the statute's remedial and regulatory aspects. Under similar circumstances, appellate courts, on numerous occasions, have refused to apply a rule of strict construction. Nappier v.

Jefferson Standard Life Insurance Co., 322 F. 2d 502, 504 (4th Cir., 1963); Wigington v. Mid-Continent Royalty Co., 130 Kan. 785, 288 Pac. 749, 753 (1930); State v. Pullen, 58 R. I. 294, 192 Atl. 473, 477 (1937); Howard v. Simons, 285 S. W. 2d 478, 480 (Tex. Civ. App., 1955); Francis v. Mauldin, 215 S. C. 374, 55 S. E. 2d 337, 340 (1949); McKenzie v. People's Baking Co., 205 S. C. 149, 31 S. E. 2d 154, 155 (1944).

Moreover, even when the statute is wholly penal, there is a greater justification for declining the rule of strict construction where, as here, the appellate court is first called upon to construe the statute in an appeal from a declaratory judgment rather than one from a criminal conviction. See Precise Imports Corporation v. Kelly, 378 F. 2d 1014, 1017 (2nd Cir., 1967). There is good reason for such an approach. This Court's construction of § 35-530, supra, will, in effect, become a part of that provision. Thus, the acceptance by the Court of the Superintendent's interpretation will provide ample warning to those who would thereafter violate its terms and, at the same time, subject neither Acacia nor its director to any criminal penalty whatever.

In sum, the statute in question regulates a business incontrovertibly affected with a public interest. Its dominant theme is remedial rather than punitive, and its application to Acacia and Corby arises, not in a criminal prosecution, but in a civil proceeding in which § 35-

530 will be construed for the first time on appeal. Throughout the years, the Superintendent of Insurance has interpreted § 35-530 in accordance with its title to apply to the fact situation here presented. This long-standing administrative interpretation is eminently reasonable and is entitled to great weight, especially in the absence of any legislative history respecting the point now before this Court. The totality of these circumstances points inexorably to the conclusion that the lower court's unreasonably strict construction of § 35-530 is plainly at variance with established principles of law.

CONCLUSION

Upon the foregoing, it is respectfully submitted that the lower court's interpretation of D. C. Code, § 35-530 (1967), is clearly erroneous. Accordingly, its judgment should be reversed.

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August 28, 1968

BRIEF FOR APPELLEES

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,139

ALBERT F. JORDAN, individually, and as Superintendent of Insurance of the District of Columbia, *Appellant*,

v.

ACACIA MUTUAL LIFE INSURANCE COMPANY, a corporation chartered by the Congress of the United States in 1869

and

KARL W. COBBY,

Appellees.

Appeal from the United States District Court for the District of Columbia

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October, 1968.

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TABLE OF CONTENTS

TABLE OF CASES

Page

STATUTES

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

In the opinion of appellees the issues presented for review are:

(1) Whether or not the trial court could properly refuse to invoke the doctrine of judicial deference to an administrative construction of a Congressional statute by the Superintendent where (i) the pertinent section of the statute involved is a criminal one, and (ii) the Superintendent has no authority either to hear, enforce or regulate any criminal provisions of the statute, such functions being left exclusively to the prosecuting attorney and the courts; and

(2) Whether or not the trial court correctly ruled that an ambiguous criminal statute must be strictly, yet reasonably, construed so as to prevent a crime from being created by inference; and, more particularly, whether Section 30 of the *Life Insurance Act,* (Section 35-530 of the *District of Columbia Code* (1967), which makes it a crime for a director or officer of a life insurance company to participate beneficially or as a broker in a loan from his company, could be enlarged by the Superintendent to subject an individual to criminal liability because of his election as a director while a loan made prior thereto was outstanding.

This case has not previously been considered by this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,139

ALBERT F. JORDAN, individually, and as Superintendent of Insurance of the District of Columbia, *Appellant*,

v.

ACACIA MUTUAL LIFE INSURANCE COMPANY, a corporation chartered by the Congress of the United States in 1869

and

KARL W. CORBY,

Appellees.

Appeal from the United States District Court for the District of Columbia

BRIEF FOR APPELLEES

COUNTER-STATEMENT OF THE CASE

The Facts

On April 12, 1962, Acacia Mutual Life Insurance Company, in the normal course of its business, made a mortgage loan of $288,000.00 to Karl W. Corby Construction Corporation, Karl W. Corby and Company, Inc. and Karl W. Corby, Edward M. Castle and William B. Asher, as individuals. The loan, a 21 year mortgage loan, with monthly payments of $2,000 including interest at 6 per

cent, is secured by a six story office building located at 1913 Eye Street, N. W. Payments on the loan have been promptly made in accordance with the terms of the agreement; and as of March 15, 1968, the unpaid principal balance of the loan was $240,409.03. (J.A. 3)

At the time this mortgage loan was made, Karl W. Corby had no connection of any kind with Acacia. Some five years after the loan was made, namely, on March 21, 1967, Mr. Corby was elected by the policyholders of Acacia to its Board of Directors. His term of office will expire in March 1970, at which time he will be eligible for re-election. (J.A. 3)

The terms of the mortgage loan were in accordance with the terms customarily applied in connection with mortgage loans of this type as of the date of its making. No special or preferential treatment was involved at the time of the making of the loan. All of its terms are fixed and are set forth in writing. (J.A. 4)

In 1953, Acacia wrote to the Superintendent of Insurance, asking whether certain of its officers could legally continue to hold mortgage loans made by Acacia to them prior to their elections as officers. The Superintendent wrote back to Acacia saying that in his opinion such loans could not be retained (J.A. 12-14).[1]

In various states having laws similar to those in the District, preventing a director or an officer of a life insurance company from negotiating a loan from his company, such officers and directors are allowed to continue loans made to them prior to their election without being subject to criminal prosecution (J.A. 41-49).

The facts and arguments concerning Mr. Corby's interest in the loan were presented to appellant in a letter from Mr. Kacy of Acacia dated June 26, 1967 (J.A. 15-18). On

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[1] Acacia, while not in agreement with this letter, did not contest it primarily for the reason the loans involved were relatively small. (J.A. 40).

June 30, 1967, the Superintendent in reply wrote appellee Acacia that it would be unlawful for Mr. Corby to have a pecuniary interest in a loan at any time while he was a director. The Superintendent went on to state:

> "* * * It seems to me that a life insurance company serves its policyholders in a fiduciary capacity, and I simply do not believe that a debtor-creditor relationship should exist between the fiduciary company and those who control it." (J.A. 20)

Acacia attempted to dissuade him from his views but failed. This suit, seeking a declaratory judgment as to the scope of the misdemeanor provisions involved, followed. After the answer was filed by appellant to the complaint both parties filed motions for summary judgment, it being agreed that there was no genuine issue as to any material fact. (J.A. 29, 33).

Opinion of the Trial Court (J.A. 50-57)

The trial court rejected the expanded construction of the misdemeanor statute urged by the Superintendent, stating:

* * *

> "This action was brought by the two plaintiffs against the Superintendent of Insurance for a declaratory judgment and is before the Court at this time on cross-motions for summary judgment.
>
> "The Corporation Counsel, who represents the defendant, with commendable candor concedes that there is a justiciable controversy in view of the possible sanctions that may be applied to the insurance company and the serious consequences that may result from them.
>
> "The answer to the question or the solution of the problem here presented depends upon a construction of the applicable statute, which is found in District of Columbia Code, Title 35, Section 530. It reads as follows:

'No director or officer of any company doing business in the District shall receive any money or valuable thing for negotiating, procuring, recommending, or aiding in any purchase by or sale to such company of any property, or any loan from such company, nor be pecuniarily interested, either as principal, coprincipal, agent, or beneficiary, in any such purchase, sale, or loan, nor shall the financial obligation of any such director or officer be guaranteed by such company in any capacity: Provided, That nothing herein contained shall prevent any such director or officer from receiving a fee for appraising property for said company or for serving on any committee that passes on the investments of said company: Provided further, That nothing herein contained shall prevent a life insurance company from making a loan upon a policy held therein by a director not in excess of the net value thereof. Any person violating any provisions of this section shall be guilty of a misdemeanor.'

"It is natural for the Superintendent of Insurance, who is an efficient, enlightened and dedicated public servant, to adopt such a construction of the statute as in his opinion would best effectuate its purposes and best protect the interests of the insurance company, its policyholders and the community. He is to be commended for this attitude. The Court, however, must construe the statute.

"At the outset it must be emphasized that a criminal penalty is attached to the statute and, therefore, it must be treated as a penal statute.

"It is fundamental that penal statutes must be strictly construed. This rule does not mean that the narrowest and strictest possible interpretation must be put on a penal statute that might completely defeat the purpose of Congress and devitalize the provisions. It does mean, however, that while the courts should put a reasonable construction on a penal statute, nevertheless it should not be broadly or liberally construed but should be interpreted in a narrow and strict manner because of the criminal penalty that may be imposed for its violation.

"An entirely different problem might have been presented here if the statute was a purely regulatory measure and contained no sanctions but those of a civil nature and perhaps vested in the Superintendent the authority and power to promulgate regulations that would interpret the Act. This is not such a case.

"Bearing in mind the principle to which reference has just been made, that penal statutes must be strictly construed, it is necessary to proceed to analyze the Act.

"There are two separate aspects to this statutory provision. The first is to the effect that no director or officer of any company doing business in the District shall receive any money or valuable thing for negotiating, procuring, recommending or aiding in any purchase by, or sale to, such company of any property or any loan from such company. The other provision is that he shall not be pecuniarily interested, either as principal, co-principal, agent or beneficiary, in any such purchase, sale or loan. It is well to consider these two parts of the statute separately.

"The first part of the statute is itself susceptible to more than one construction. One way to read that clause is as follows:

> 'No director or officer of any company doing business in the District shall receive any money or valuable thing for negotiating, procuring, recommending or aiding in . . . any loan from such company.'

"The meaning of the provision, if so read, is that a director or officer may not receive any compensation or fee or commission for procuring a loan to be made.

"There is another way of reading that provision and it is as follows:

> 'No director or officer of any company doing business in the District shall receive . . . any loan from such company.'

"The first of these two constructions would adopt too narrow a view because it is quite apparent that Congress intended to reach at least two results. One

was to bar a director or officer from receiving any compensation, such as broker's commissions, for procuring a loan to be made. The other was—and perhaps a more important one—to prevent a director or officer of an insurance company from borrowing any money from the insurance company while he was a director or officer.

"The second part of the statute bans a director or officer of any insurance company from being 'pecuniarily interested, either as principal, co-principal, agent or beneficiary, in any such purchase, sale or loan.' This clause is clearly ambiguous and indefinite. What is meant by being pecuniarily interested in a loan either as principal, co-principal, agent or beneficiary? Does it mean and does it relate to the transaction of lending money, or does it have a broader scope and apply to the status of a loan so as to be applicable during the entire period that the loan is in existence?

"Bearing in mind that, as stated heretofore, penal statutes should be narrowly construed, the Court is of the opinion that the first of these two constructions should be adopted.

"In addition to the requirement of narrow construction of penal statutes we must apply another principle, that ambiguities in a penal statute should be resolved in favor of a person who is affected by it, in view of the basic doctrine that a criminal penalty shall not be imposed on anyone for some violation that is not clearly accentuated in the statute.

"In the light of these considerations the Court construes this statute, insofar as the question involved in this case is concerned, as containing two prohibitions. One is that no director or officer of any company doing business in the District of Columbia shall receive any compensation, such as broker's commission or fee, for negotiating or procuring a loan from the company with which he is so connected; second, that no director or officer may receive any loan from the company of which he is such a director or officer. It does not bar a person who had previously received a loan from the

company from later on becoming a director or officer, even though the loan is still outstanding.

"The conclusion necessarily follows that the plaintiff Corby was eligible to be elected to the Board of Directors of Acacia and is eligible to continue as such.

"The plaintiffs' motion for summary judgment is granted and the defendant's cross-motion is denied.

"Counsel may submit a proposed order in accordance with this ruling." (J.A. 52-57)

SUMMARY OF ARGUMENT

The Superintendent has no authority to enlarge upon the criminal provisions of the *Life Insurance Act*, 35-530 *D.C. Code* (1967). *Nelson* v. *United States* (C.A.D.C. 1961) 109 U.S. App. D.C. 393, 288 F.2d 376. He cannot demand that the courts defer to his administrative expertise under the *Tallman*[2] doctrine, where his views solely consisted of a prior unpublished opinion in a letter. Particularly, this is true where appellant seeks to construe a criminal section of law which he neither administers nor enforces.

Criminal provisions of a regulatory statute are to be strictly, yet sensibly, construed. *Federal Communications Commission* v. *American Broadcasting Co.* (1954) 347 U.S. 284, 98 L.Ed. 699; and if the language in the criminal provision is vague or ambiguous, and there is no clearly discernible legislative purpose, the ambiguity must be resolved against an extension of the criminally prohibited conduct. *Ladner* v. *United States* (1958) 358 U.S. 169, 3 L.Ed.2d 199. Crimes cannot be created by inference or intendment. *United States* v. *Laub* (1967) 385 U.S. 475, 17 L.Ed.2d 526; *Nelson* v. *United States, supra.*

The trial court did not adopt an overly narrow construction of the criminal provisions involved here which defeated

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[2] *Udall* v. *Tallman* (1965) 380 U.S. 1, 13 L.Ed.2d 616.

its clear language or which frustrated its clear purpose. To the contrary, the trial court's construction of the pertinent provisions of the *Life Insurance Act* was a reasonable one in harmony with the basic object of that provision. The trial court properly ruled that a statute which makes it a misdemeanor for a director or officer of a life insurance company to participate, either as a broker or beneficially, in a loan from the company, should not be extended to subject an officer or director to criminal liability because of his participation, either as a broker or beneficially, in a wholly proper loan made five years prior to his election as a director or officer, because the loan still is outstanding.

ARGUMENT

(a)

The trial court correctly held that judicial deference is not due to the Superintendent's construction of a statute where the section of the statute involved was a criminal section neither enforced nor administered by appellant. The Superintendent has no authority to enlarge by construction the pertinent provisions of the Life Insurance Act

The Superintendent attacks the construction given by the trial court to Section 35-530 upon two grounds: First, he argues that the trial court was required by law to accept his interpretation in accordance with the doctrine of judicial deference to administrative construction if it was not patently unreasonable or capricious. Conversely, so says the Superintendent, the trial court committed reversible error by not accepting his views since they were not manifestly unreasonable. Appellant cites *Udall* v. *Tallman* (1965) 380 U.S. 1, 13 L.Ed.2d 616; *Philadelphia Television Broadcasting Co.* v. *F. C. C.* (C.A.D.C. 1966) 123 U.S. App. D.C. 298, 359 F.2d 282, as authority for his position.

The *Udall* and *Philadelphia Television* cases relied upon by the Superintendent do not apply to nor do they govern the construction to be given to a criminal statute; those

cases relate to judicial deference to be given a long standing uniform administrative construction of civil statute by the agency charged with its implementation and enforcement. *Cf. Udall* v. *Tallman supra* (leasing by the Interior Department of the public lands); *Philadelphia Television Broadcasting Co.* v. *F.C.C. supra*, (granting by the F.C.C. of television licenses). In the *Udall* case, the Supreme Court specifically conditioned the rule of judicial deference to agency construction to those situations where the agency administered the provisions in question (380 U.S. at 16, 13 L.Ed.2d at 625). Here, as the trial court properly noted, the section of law involved is a criminal provision which the court, not appellant, must construe (J.A. 53).

The doctrine of judicial deference to administrative construction has not yet been extended to the point where the court must adopt an informal opinion of an administrative officer regarding a criminal section which he neither administers or enforces. Administrative rulings cannot enlarge the scope of a law so as to make criminal conduct which a law leaves untouched. *United States* v. *Standard Brewery* (1920) 251 U.S. 210, 64 L.Ed. 229.

Nelson v. *United States* (C.A.D.C. 1961) 109 U.S. App. D.C. 393, 288 F.2d 376, is particularly pertinent and wholly dispositive of the Superintendent's first contention. There, he sought to extend by a regulation the ambit of prohibited criminal conduct set forth in the *Life Insurance Act, supra,* Section 35-425. He there relied on certain sweeping language purportedly giving him broad regulatory authority with regard to the Act. This court, speaking through Judge Danaher, held that the Superintendent could not expand the criminal scope of the Act. Judge Danaher reasoned in part as follows:

> "It is clear that Congress has conferred upon the Superintendent certain administrative functions. He acts under particular and enumerated conditions. He

> has not been given the power to promulgate regulations. Congress has not authorized him so to act as to make felonious even a knowingly false answer to a question which Congress had not made material. 'Where the charge is of crime, it must have clear legislative basis.' In short, 'Before one may be punished, it must appear that his case is plainly within the statute; there are no constructive offenses.' " (at 109 U.S. App. D.C. 395, 288 F.2d 379.) See also: *Atlantic Insurance Agency, Inc.* v. *Jordan* (C.A.D.C. 1955) 97 U.S. App. D.C. 184, 229 F.2d 758.

In the *Nelson* case the Superintendent tried to expand the scope of criminal conduct proscribed in the *Life Insurance Act* by issuing regulations under an alleged grant of broad authority; here he tries to accomplish the same result by an opinion allegedly construing the Act. In either event he raises a crime "not plainly within the statute". And, this, as the *Nelson* case properly held, he cannot do. It is beyond peradventure that the rule in the *Nelson* case represents the overwhelming weight of authority; crimes may not be created by inference. *United States* v. *Laub* (1967) 385 U.S. 475, 17 L.Ed. 526; see also *United States* v. *Universal C.I.T. Credit Corp.* (1952) 344 U.S. 218, 97 L.Ed. 260.

(b)

The trial court correctly stated the governing principles of law: A criminal statute must be strictly, yet reasonably, construed: there is no doctrine justifying a liberal construction of the instant criminal provisions

Appellant's principal thrust for attempting to upset the decision below is based upon his contention that the trial court ruled solely upon the basis of an erroneous doctrine requiring all language in a criminal statute to be most strictly construed, regardless of the circumstances or consequences. According to the Superintendent, had the trial court not felt bound by this inflexible command, it concededly would have supported his proffered construction. (See e.g. Appellant's Br. pp. 3-4, 12-13).

Having first set up a straw predicate appellant then proceeds to demolish it by citing numerous authorities to the

effect that the rule of strict construction of a criminal statute is not an invariable one. The Superintendent then contends that a criminal statute is not to be strictly construed if ". . . the dominant theme of the statute is to regulate a certain subject matter in the public interest". (Appellant's Br. p. 12). Thus, according to the Superintendent, the trial court must be reversed because its predicate of law was an erroneous one. (Appellant's Br. pp. 9-12)

This approach doubly disserves the trial court. In the first place, the trial court did not base its ruling on any unalterable doctrine of stringent construction of penal statute regardless of the circumstances; secondly there is no generally accepted principle of law requiring a criminal law to be broadly interpreted if its dominant theme is to regulate a matter in the public interest.

The trial court below stated the governing principles of law for this case as follows:

* * *

> "It is fundamental that penal statutes must be strictly construed. This rule does not mean that the narrowest and strictest possible interpretation must be put on a penal statute that might completely defeat the purpose of Congress and devitalize the provisions. It does mean, however, that while the courts should put a reasonable construction on a penal statute, nevertheless it should not be broadly or liberally construed but should be interpreted in a narrow and strict manner because of the criminal penalty that may be imposed for its violation.
>
> "An entirely different problem might have been presented here if the statute was a purely regulatory measure and contained no sanctions but those of a civil nature and perhaps vested in the Superintendent the authority and power to promulgate regulations that would interpret the Act. This is not such a case.[3]

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[3] In light of the *Nelson* case, *supra*, any holding permitting appellant to invoke broad criminal sanctions would have been clearly in error.

> "Bearing in mind the principle to which reference has just been made, that penal statutes must be strictly construed, it is necessary to proceed to analyze the Act" (J.A. 53-54).

This is manifestly a correct statement of the law throughout the federal courts. Thus, the Supreme Court held in *Securities and Exchange Commission* v. *Joiner Leasing Corp.* (1943) 320 U.S. 354, 355, 88 L.Ed. 89 (involving a construction of penal provisions in the Securities Act):

> "But this Court, as early as 1820, speaking through Chief Justice Marshall, said: 'The rule that penal laws are to be construed strictly, is perhaps not much less old than than construction itself . . . It is said, that notwithstanding this rule, the intention of the law-maker must govern in the construction of penal, as well as other statutes. This is true. But this is not a new independent rule which subverts the old. *It is a modification of the ancient maxim, and amounts to this, that though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature.*" (at 320 U.S. 355, 88 L.Ed. 95) (Italics supplied)

Again in *United States* v. *Bramblett* (1954) 348 U.S. 503, 99 L.Ed. 594, the Supreme Court said:

* * *

> "That criminal statutes are to be construed strictly is a proposition which calls for the citation of no authority. But this does not mean that every criminal statute must be given the narrowest possible meaning in complete disregard of the purpose of the legislature." (at 348 U.S. 509-10, 99 L.Ed. 600).

The same doctrine has been repeatedly followed in our Circuit. See e.g. *Neufield* v. *United States* (1941) 73 App. D.C. 174, 118 F.2d 375; and it was previously adhered to by the learned trial judge herein in an earlier case. See *United States* v. *Meyers* (D.C.D.C. 1948) 75 F.Supp. 486,

at 487, aff'd. (1948) 84 U.S. App. D.C. 101, 171 F.2d 800, *cert. den.* 336 U.S. 912, 93 L.Ed. 1076.

Obviously, then, a criminal statute must be strictly construed, but this rule is not to be carried to such an extreme as to nullify the language of the statute or defeat a clear Congressional purpose. And this is the very rule which the trial judge correctly enunciated.

The Superintendent, however, takes the qualifying language of the foregoing rule out of context and goes on to argue that the doctrine of strict construction can be avoided entirely and a broader construction substituted, if there is ambiguity. This is not the law. Unless there is clear language or a clearly discernible Congressional intent, ambiguous language in a criminal statute must be construed tightly.

Thus, the Supreme Court held in *Ladner* v. *United States* (1958) 358 U.S. 169 at 177-178, 3 L.Ed. 2d 199 at 205:

* * *

> "It is therefore apparent that § 254 may as reasonably be read to mean that the single discharge of the shotgun would constitute an 'assault' without regard to the number of federal officers affected, as it may be read to mean that as many 'assaults' would be committed as there were officers affected. Neither the wording of the statute nor its legislative history points clearly to either meaning. In that circumstance the Court applies a policy of lenity and adopts the less harsh meaning. '[*W*]*hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication.*' United States v. Universal, C.I.T. Credit Corp., 344 U.S. 218, 221, 222, 97 L.Ed. 260, 263, 264. 73 S. Ct. 227. And in Bell v. United States, 349 U.S. 81, 83, 99 L.Ed. 905, 910, 75 S. Ct. 620, the Court expressed this policy as follows: 'When Congress

leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity.' "[4] (Italics supplied)

We now turn to the Superintendent's contention that where a criminal statute relates to a subject matter in the public interest "the rule of strict construction will not be given effect" (Appellant's Br. p. 12). This is an oversimplification which is not borne out by the overwhelming case law.

The federal courts repeatedly have been called upon to rule upon criminal provisions, as distinguished from penalties in civil proceedings, found in broad regulatory statutes relating to subjects in the public interest. Almost uniformly the courts have construed those criminal provisions strictly, albeit not unreasonably, in accordance with the very doctrine applied by the learned trial judge herein. See e.g. *Securities and Exchange Commission* v. *Joiner Leasing Corp. supra; United States* v. *Laub* (1967) 385 U.S. 475, 17 L.Ed. 2d 526 (construing strictly, a criminal provision of the Immigration and Nationality Act); *United States* v. *Universal C.I.T. Credit Corporation* (1952) 344 U.S. 218, at 221, 97 L.Ed. 260, at 264 (construing strictly the criminal provisions of the Fair Labor Standards Act); *American Broadcasting Co.* v. *United States* (D.C.N.Y. 1953) 110 F. Supp. 374 *aff'd. Federal Communications Commission* v. *American Broadcasting Co.* (1954) 347 U.S. 284, 98 L.Ed. 699 (construing strictly the criminal provisions of the Communications Act); *United States* v. *Woody Fashions, Inc.* (D.C.N.Y. 1961) 190 F.Supp. 709 (construing strictly the criminal provisions of the Wool Products Labeling Act).

The cases cited by the Superintendent in no way contradict the authorities referred to above nor do they conflict

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[4] The quotation from *Bell* v. *United States* (1955), 349 U.S. 81, 99 L. Ed. 905 (construing the Mann Act), was preceded by the following:

"When Congress has the will, it has no difficulty in expressing it—" (at 349 U.S. 83, 99 L. Ed. 910).

with the principles of law applied by the trial court. In *Johnson* v. *Southern Pacific Company* (1904) 196 U.S. 1, 17, 49 L.Ed. 362, the Supreme Court was called upon to construe the language in the Railway Safety Act. There a brakeman had his hand caught while manually coupling a locomotive to a dining car. The act required all "cars" to be equipped with automatic couplers and provided a punitive fine for failure to comply. It was contended that a locomotive was not a "car" and that the brakemen could not recover. In rejecting this view the Court noted:

> "The primary object of the act was to promote the public welfare by securing the safety of employees and travelers; and it was in that aspect remedial; while for violations a penalty of $100, recoverable in a civil action, was provided for, and in that aspect it was penal. But the design to give relief was more dominant than to inflict punishment, and the act might well be held to fall within the rule applicable to statutes to prevent fraud upon the revenue, and for the collection of customs, that rule not requiring absolute strictness of construction. * * *" (at 196 U.S. 17, 49 L.Ed. 369)

The misdemeanor statute here involved cannot be considered "remedial" by any stretch of the imagination; the section here involved was not designed to give any person relief. It was designed to and did make criminal certain conduct by a director or officer of a life insurance company. It might be further noted that the Supreme Court in the *Johnson* case, *supra,* went on to quote from the familiar doctrine that while a penal statute must be construed strictly, it should not be construed so strictly as to defeat its obvious legislative purpose. As noted before, this is the doctrine which the trial court applied.

In *Northern Securities Co.* v. *United States* (1904) 193 U.S. 197, 48 L.Ed. 679, the Court was concerned with the application of the Sherman Act. In refusing to adopt a

construction which would nullify the obvious purpose of that statute the Supreme Court stated:

* * *

> "It is said that this statute contains criminal provisions and must therefore be strictly construed. The rule upon that subject is a very ancient and salutary one. It means only that we must not bring cases within the provisions of such a statute that are not clearly embraced by it, nor by narrow, technical, or forced construction of words, exclude cases from it that are obviously within its provisions. * * *" (at 193 U.S. 358, 48 L.Ed. 709)

Again in *United States* v. *Stowell* (1889) 133 U.S. 1, 33 L.Ed. 555, and *United States* v. *Mississippi Valley Generating Co.* (1961) 364 U.S. 520, 5 L.Ed.2d 268, this same rule was enunciated.[5] And, as before noted, the language in *Securities & Exchange Commission* v. *Joiner Leasing Company, supra,* is strikingly similar to the language used by the trial court. Quite obviously both refer to the same rule.

The Superintendent's legal position ultimately devolves to a fifty year old District case, namely, *District of Columbia* v. *Horning* (1918) 47 App. D.C. 413,[6] upon which appellant heavily relies (Appellant's Br. p. 13). The *Horning* case is a peculiar one in which the result reached was correct in view of its singular circumstances.

In *Horning* a pawnbroker operating in the District sought to evade the impact of a law then going into effect requiring the licensing of all pawnbrokers. To circumvent that law he opened a Virginia office located just on the other

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[5] The *Mississippi Valley* case involved a penal conflict of interest statute, and its facts are atypical of the normal regulatory statute containing criminal provisions.

[6] This particular aspect of the *Horning* case was not affirmed by the Supreme Court. That Court's affirmance at 254 U.S. 135 related to another aspect of the *Horning* case, decided in *Horning* v. *District of Columbia,* (1919) 48 App. D.C. 380.

side of the Potomac River. He supplied free transportation to take his customers from his District office to his Virginia office and then back again. He then divided his pawnbrokering operations into two phases—one part to be performed in the District, the other in Virginia. From this background he argued that he was not engaging in the business of pawnbrokering in the District, since he was not completing all of the necessary ingredients of that business in the District. He contended that since the statute involved was a criminal one, all of its elements must be performed in the District. In this context this Court stated:

> "Laws of this sort, are enacted for public; and courts look with disfavor upon attempts, by circumvention or subterfuge, to escape their restrictions".
>
> • • •
>
> "The conducting of a business consists of many elements and many separate acts; and when it appears that any of the acts essential to the complete transaction of the business have been carried on within the jurisdiction where the doing of the business is prohibited, the transgressor will be held to come within the limitations of the act. The rule of strict construction as applied to criminal statutes is relaxed in the interpretation of an act designed to declare and enforce a principle of public policy. We must keep in mind the purpose of the legislation and the evils sought to be prohibited, and, if possible, give force and effect to the legislative intent. United States v. Corbett, 215 U.S. 233, 54 L.Ed. 173, 30 Sup. Ct. Rep. 81; District of Columbia v. Dewalt, 31 App. D.C. 326; United States v. Cella, 37 App. D.C. 423." (at 47 App. D.C. 423)

As can be seen from the above, the *Horning* case did not concern itself with the construction of language in a statute. Rather, it was concerned with what constituted the ingredients of pawnbrokering; and more particularly whether all of the elements must be performed in the District in order to come under the law there involved. The court held they

did not. Insofar as it may be claimed that the *Horning* case holds that *any* criminal statute affecting the public interest is to be liberally construed, (which we submit would not be a fair reading), it is in direct conflict with and superseded by this Court's later ruling in *Nelson* v. *United States, supra.*

The Superintendent also seems to assert that where the application of the statute is in a civil, not criminal, context the court could more easily refuse to apply the doctrine of strict construction. He cites two federal circuit court decisions and various state cases as authority therefor (Appellant's Br. pp. 13-14). This, again, is an oversimplification; indeed, the principal thrust of these cases is directed at the same considerations as were applied by the trial court here.

Insofar as it may be said that *Precise Imports Corporation* v. *Kelly* (2 Cir. 1967) 378 F.2d 1014 holds that a criminal statute is to be more leniently construed if it is first tested by way of civil proceeding, it is in conflict with the pronouncement of the United States Supreme Court in *Federal Communications Commission* v. *American Broadcasting Company, supra.* There the Court was presented with that very issue, and squarely ruled upon it as follows:

> "It is true, as contended by the Commission, that these are not criminal cases, but it is a criminal statute that we must interpret. There cannot be one construction for the Federal Communications Commission and another for the Department of Justice. If we should give § 1304 the broad construction urged by the Commission, the same construction would likewise apply in criminal cases. We do not believe this construction can be sustained. Not only does it lack support in the decided cases, judicial and administrative, but also it would do violence to the well-established principle that penal statutes are to be construed strictly." (at 347 U.S. 296, 98 L.Ed. 709)

(c)

The trial court properly applied the governing legal principles in its construction of the criminal provisions of the Life Insurance Act here involved

Having demonstrated that the principles of law relied upon by the trial court were applicable and correct, the sole remaining issue is whether the trial court correctly applied those principles. In other words, did the trial court so strictly construe the section of law here involved as to nullify its language or defeat its clear legislative purpose. Clearly it did not.

As revealed by the opinion of the trial court, the criminal section of the *Life Insurance Act, supra,* here involved is ambiguous and obscure in various respects. More particularly, does it only prohibit an officer or director (1) from acting as broker for pay regarding a sale, purchase or loan for a third party, and (2) from being the beneficiary, direct or indirect of a sale, purchase or loan occurring or made while he occupies the status of an officer or director? Or, does the statute provide, as appellant contends, that "pecuniarily interested" in a loan means that where the loan, previously made, continues to exist after the individual becomes an officer or director, it is improper for the officer or director to remain in office?

At the outset the trial court rejected an overly narrow construction of the section which would limit its impact solely to the receipt of money by a director or officer for acting as an agent or broker on behalf of a third party for arranging a loan, sale, or purchase with his company. The trial court felt that the purpose of the statute was somewhat broader than this, noting:

> "The first of these two constructions would adopt too narrow a view because it is quite apparent that Congress intended to reach at least two results. One was to bar a director or officer from receiving any compensation, such as broker's commissions, for procuring a loan to be made. The other was—and per-

haps a more important one—to prevent a director or officer of an insurance company from borrowing any money from the insurance company while he was a director or officer." (J.A. 55)

Having thus rejected an overly strict construction which, in its view, would have defeated the legislative purpose, the district judge then went on to consider exactly what classes of dealing between a director and his company were prohibited, stating (J.A. 55):

> "The second part of the statute bans a director or officer of any insurance company from being 'pecuniarily interested, either as principal, co-principal, agent or beneficiary, in any such purchase, sale or loan.' This clause is clearly ambiguous and indefinite. What is meant by being pecuniarily interested in a loan either as principal, co-principal, agent or beneficiary? Does it mean and does it relate to the transaction of lending money, or does it have a broader scope and apply to the status of a loan so as to be applicable during the entire period that the loan is in existence?"

The lower court chose the "first of these two constructions", thus holding that a director was not subject to criminal liability for a loan made, prior to his election to the Board but still outstanding, and specifically expressing itself in the following observations:

> "In addition to the requirement of narrow construction of penal statutes we must apply another principle, that ambiguities in a penal statute should be resolved in favor of a person who is affected by it, in view of the basic doctrine that a criminal penalty shall not be imposed on anyone for some violation that is not clearly accentuated in the statute.
>
> "In the light of these considerations the Court construes this statute, insofar as the question involved in this case is concerned, as containing two prohibitions. One is that no director or officer of any company doing business in the District of Columbia shall

> receive any compensation, such as broker's commission or fee, for negotiating or procuring a loan from the company with which he is so connected; second, that no director or officer may receive any loan from the company of which he is such a director or officer. It does not bar a person who had previously received a loan from the company from later on becoming a director or officer, even though the loan is still outstanding." (J.A. 56.)

Thus it can readily be seen that the trial court's approach was one of reasonableness; it construed the statute with sufficient latitude to encompass the basic legislative purposes, yet it refused to go so far as to create a crime by implication. And, just as the first portion of the statute clearly does not subject a director or officer to criminal punishment because of his earlier participation in securing a loan for a third party before his election, simply because that loan may still be outstanding, so, similarly, the trial court refused to extend the beneficial-interest portion of that section to the point where an officer or director could be punished because of his election to the Board while a loan made to him prior to his affiliation with the company was still outstanding.

Moreover, the broad construction urged by the Superintendent is not necessarily in the public interest. It could well disserve the company and its policyholders. Thus, if a life insurance company had made a loan whose terms benefited its policyholders, it would be forced to dispose of that loan, under the Superintendent's extra-judicial pressure, if a party to the loan was later elected to its Board of Directors. For, pragmatically speaking, no corporation would likely sacrifice its directors or officers merely to keep a loan. Rather, it will sacrifice the loan.

The evil to which Congress obviously addressed itself was that of a director or officer acting in conflict with his company. This is a common heading of the law, and one

covered in various laws other than those relating to insurance companies. See e.g. *Chenery Corp.* v. *Securities and Exchange Commission* (C.A.D.C. 1942) 75 U.S. App. D.C. 374, 128 F.2d 303, cause remanded, 318 U.S. 80, 87 L.Ed. 626; *Merger Mines Corp.* v. *Grismer* (9 Cir. 1943) 137 F.2d 335, *cert. den.* 320 U.S. 794 88 L.Ed. 478. The thrust of these laws is to preclude a person who holds a position of trust with a company from *acting* inconsistently with his company while he holds that position.

The Superintendent, however, would stretch the more traditional concepts prohibiting conflicting interests by a director or officer to the point where no director or officer could have any current financial interest in any loan or transaction regardless of when made or how created. He thus says: "In short Section 35-530 embraces [i.e. prohibits] any debtor relationship between a director and his company irrespective of the chronological sequence in which it arose" (Appellant's Br. p. 12). This is a dubious construction at best, and one clearly contrary to accepted principles.

In cases of doubt, the construction to be given to a statute is the one that accords most closely with the common law. *Blackard* v. *City National Bank* (D. C. Alaska 1956) 142 F.Supp. 753. And, of course, if there is ambiguity in a criminal law, the doctrine of lenity applies, *Ladner* v. *United States, supra,* for crimes cannot be created by inference. *Nelson* v. *United States, supra.*

Furthermore, the Superintendent's reasoning misapplies the latter proviso of section 35-530, which specifically authorizes an officer or director to obtain a policy loan from his company if it is not in excess of the net value of the policy. Obviously, it cannot be said that Congress was legislating against debtor-creditor relationships, as the Superintendent would administratively do. Rather, Con-

gress having expressly allowed a debtor-creditor relationship to be thus established, did not intend that the statute should be construed as making that relationship, alone, an unlawful status.

The Superintendent conjures up various situations, such as a default, which he claims will open the door to abuse and breach of trust if his views are not adopted. But these same general situations would arise under the specifically permitted policy loan, just as well as under a mortgage loan. Moreover, such reasoning ignores practicality. In our current business world, the opportunity for abuse by "insiders" comes at the inception of the transaction *via* unfair terms, not at the time of default when the obligations are fixed and become a matter for the courts.

In sum, then, the Superintendent has tried to make it appear that the lower court could be sustained only by a blind adherence to a rigid doctrine of strict construction of a criminal statute regardless of the consequences. And, as a corollary, appellant conjures up many specters of evil unless his liberal views be adopted. The trial court, however, indulged in no such specious legal holding or fanciful reasonings. It approached the construction of the section of the Act here involved upon the basis of construing it strictly, yet reasonably, in light of the legislative purpose. Its ruling, businesswise, was a sensible one, and one in keeping with the application of similar statutes in other jurisdictions (cf. JA 42-50). Its legal precepts were buttressed by overwhelming authority. Accordingly, it cannot be said that the trial court erred.

If the Superintendent desires to expand the scope of the criminal sanctions in the *Life Insurance Act, supra,* the place to do it is in Congress—not by way of administrative opinion or enlarged judicial construction.

CONCLUSION

The ruling of the lower court was correct. It should be affirmed.

Respectfully submitted,

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